

VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [REDACTED] 1964

No. [REDACTED]

48

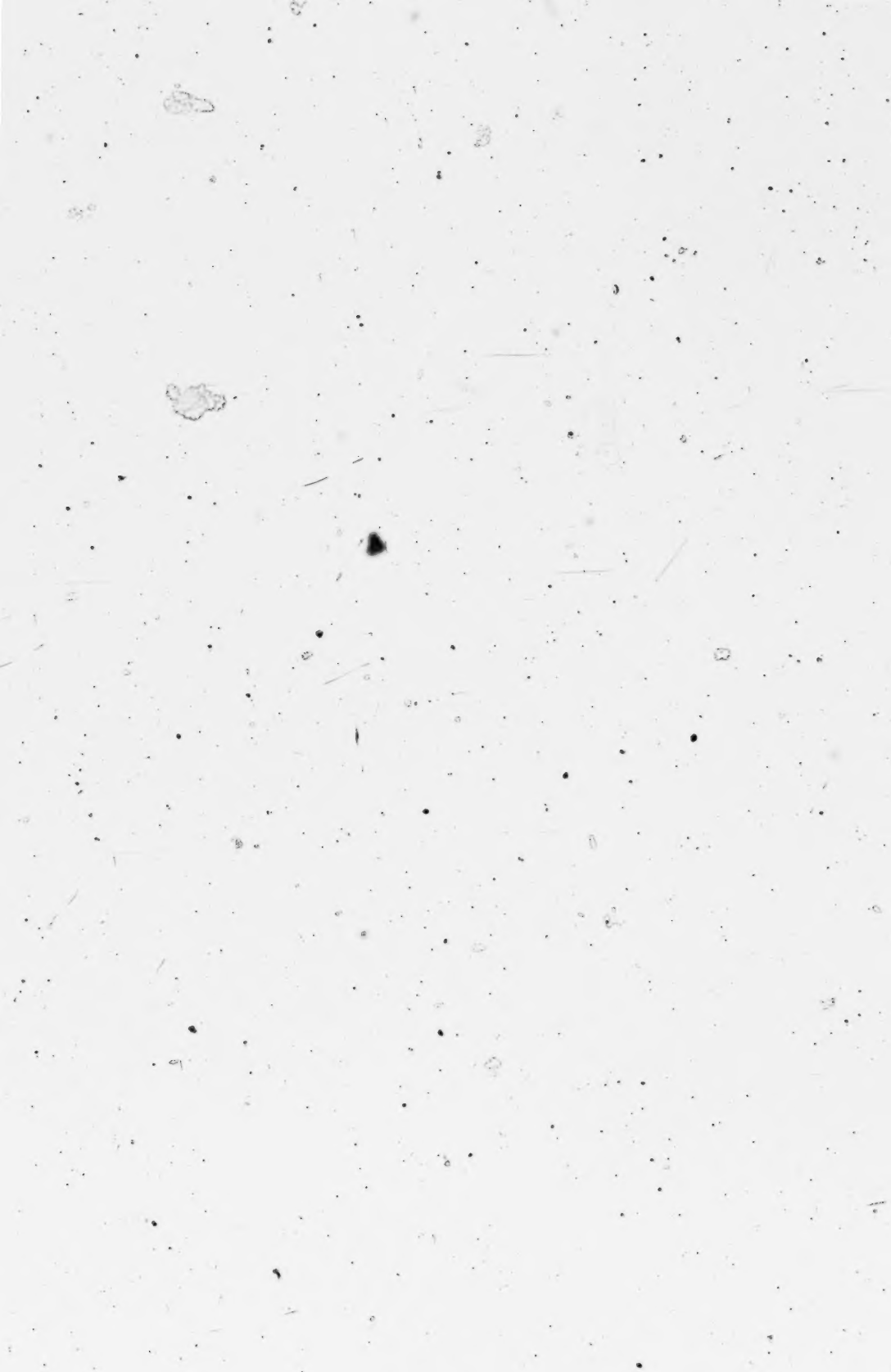
**UNITED MINE WORKERS OF AMERICA,
PETITIONER,**

vs.

JAMES M. PENNINGTON, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964**



Joint Appendix

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS
and LILLIAN GOAD PHILLIPS, Admr. of the
Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and
JOSEPHINE ROCHE, as Trustees of the
UNITED MINE WORKERS OF AMERICA WELFARE AND
RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS
and LILLIAN GOAD PHILLIPS, Admr. of the
Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District
Court for the Eastern District of Tennessee, Northern Division

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Statements of Counsel

eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

"The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

1994 "It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon."

We rely upon the provisions with respect to the Welfare Fund in succeeding contracts in similar language, with the modification in the 1950 contract, which adds the provision in the paragraph sub-part 4 with respect to benefits, page 86, which adds to the language: "including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents," — adding the following language — "and to employees of the Operators other than those exempted from this Agreement."

And the amendments in the Welfare Fund provisions which name the trustees, commencing in the 1950 contract, which read as follows:

1995 "The operators signatory hereto do hereby appoint Charles A. Owen of New York City as their representative on said Board of Trustees.

"The United Mine Workers of America do hereby appoint John L. Lewis of Washington, D. C., as its representative on said Board of Trustees.

Statements of Counsel

"It is further stipulated and agreed by the joint contracting parties that Josephine Roche of Denver, Colorado, is appointed as a neutral trustee.

"Said three trustees so named and designated shall administer the Fund herein created."

We will rely upon the wages, provisions of the succeeding contracts which have already been referred to in the proof, and of course the signatures to the contract, the various contracts.

We rely upon the 1952 contract, page 108, the provisions with respect to application of the contract to coal lands which has been elaborated upon in the proof.

And we rely upon the 1958 protective wage clause that is contained in the 1958 amendment to the National Bituminous Coal Wage Agreement which is quite lengthy, and which has been summarized and referred to in the proof, and the increases in the Welfare royalty in the Welfare Fund parts in the succeeding contracts.

1996 Mr. Kramer: Are you leaving that portion at the moment?

Mr. Rowntree: Yes.

Mr. Kramer: That completes that?

Mr. Rowntree: Yes.

Mr. Combs: May it please the Court, the cross-defendants will rely upon those portions of the contracts that have to do with the union security clause, the union shop clause, the land-leasing clause, the protective wage clause, those sections of the contract that have been elaborated on here.

We will expect to use those in our arguments for a directed verdict.

Mr. Rowntree: The defendants and cross-plaintiffs rest.

Mr. Kramer: We have some matters to which we would like to call the attention of the Court, Your Honor.

The Court: All right, let the jury be excused.

(Thereupon, the jury was excused, and the following proceedings were had in the absence of the jury.)

Trustees' Motion for Directed Verdict

Mr. Kramer: We will have, Your Honor—want to present to Your Honor out of the presence of the jury two separate motions.

1997 One will be a motion for a directed verdict on behalf of the Trustees, the other will be a motion for a directed verdict on behalf of the cross-defendant—that is on behalf of the original plaintiff Trustees, and on behalf of the cross-defendants United Mine Workers of America.

We want to make these motions separately and present them separately, and Mr. Rayson is going to first present the motion on behalf of the Trustees.

The Court: All right.

Mr. Bayson: May it please the Court, plaintiffs John L. Lewis, Henry G. Schmidt, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, move the Court to direct a verdict in their favor in the sum of \$55,982.62, plus interest and the cost of this action on the following grounds:

First that the amount of the judgment in favor of the plaintiffs, if plaintiffs are determined to be entitled to judgment has been stipulated by the parties to be \$55,982.62;

Second, the sole defense raised by the defendants to plaintiffs' recovery is their alleged participation in an alleged conspiracy to violate the Sherman Anti-trust Act;

1998 Third, the defendants have not presented any material evidence that the plaintiffs were parties to or participants in any alleged conspiracy to violate the Sherman Anti-trust Act, and specifically that there has been no material evidence presented to prove the overt acts attributed to plaintiffs, that is that the plaintiffs paid trust benefits solely to members of the United Mine Workers of America, that they required pensioners to engage

U.M.W.'s Motion for Directed Verdict

in picketing activities for the United Mine Workers of America to obtain or retain benefits of the trust, or that they brought suits to recover the royalties owing from the operators in furtherance of the alleged conspiracy.

And our motion is based on these further grounds, Your Honor:

Four, the allegation that the plaintiffs were parties to or participated in an alleged conspiracy to violate the Sherman Anti-trust Act does not preclude the plaintiffs, as Trustees, from recovery as a matter of law since such alleged acts would constitute a basis for individual liability of the Trustees and would not defeat the rights of the Fund which they administer;

Five, the evidence is insufficient as a matter of law to warrant a finding that the alleged conspiracy to 1999 violate the Sherman Anti-trust Act renders the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto invalid and unenforceable ab initio, so as to preclude plaintiffs' recovery of royalty for coal produced by employees who are beneficiaries of the Trust.

2063 Mr. Combs: May it please the Court, cross-defendant United Mine Workers of America moves the Court for a directed verdict in its favor pursuant to Rule 50(a), F.R.C.P., on the following grounds:

1. There is no material or substantial or competent evidence that cross defendant United Mine Workers joined in or was a party to any conspiracy as alleged in the complaint, or that the cross-plaintiffs have suffered any damage or injury directly or proximately as a result of any such wrongful conduct on the part of the United Mine Workers.

2 Cross-plaintiffs have failed to establish, prima facie, that the United Mine Workers entered into any contract

Testimony of Josephine Roche

2064 combination or conspiracy, or engaged in any combination or conspiracy, in restraint of interstate trade or commerce in violation of the Sherman Act and particularly Section 1 thereof.

3 Cross-plaintiffs have failed to establish, prima facie, that the United Mine Workers monopolized, or attempted to monopolize, or combined or conspired with any of the alleged co-conspirators, one or more, to monopolize or attempt to monopolize any part of interstate trade or commerce in violation of the Sherman Act and particularly Section 2 thereof.

4. Cross-plaintiffs have failed to establish, prima facie, that there has been any unreasonable restraint of interstate trade or commerce, or any control, attempted or consummated, of an unreasonable part of interstate commerce in violation of the Sherman Act.

5. Cross-plaintiffs have failed to establish that they have been injured or damaged directly and proximately in their business or property from any United Mine Workers conduct forbidden by Sections 1 and 2 of the Sherman Act.

6. Cross-plaintiffs have failed to prove that the violations of the Sherman Act alleged by them have, in fact, caused them any damages.

2237 The Court: It is a troublesome question.

Gentlemen, the Court is constrained to overrule the motions as of the present time.

Adjourn Court.

Mr. Kramer: Does that apply to both motions?

The Court: Yes, sir, both motions at the present time.

2267 JOSEPHINE ROCHE

called as a witness by and on behalf of plaintiff and cross-defendant, after having been first duly sworn.

Testimony of Josephine Roche

2268

DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Miss Josephine Roche, I believe? That is your name? A. Yes.

Q. Miss Roche, are you one of the three trustees of the Welfare and Retirement Fund of the United Mine Workers of America? A. I am one of the three trustees of the United Mine Workers of America Welfare and Retirement Fund.

Q. Miss Roche, where were you born? A. Nebraska.

Q. In Nebraska? A. That is right.

Q. During your early life, girlhood, where did you live? A. In Omaha, briefly in Sioux City and then in Denver, Colorado, and part of the time also in northern Michigan, St. Sault Marie, very briefly.

Q. What line of work was your father engaged in? Just briefly. A. Briefly, my father was primarily a banker, opened his first bank west of the Mississippi River in eastern Nebraska. He was interested in all kinds of
*2269 development of the western possibilities, lands and farms, cattle, also in Michigan, had interests in Michigan timber developments and then later in the coal developments in Colorado.

Q. During his later years, he was interested in developments in coal? A. That is right, sir.

Q. Of what institution or institutions are you a graduate? A. Of Vassar College and my graduate work in economics and social legislation at Columbia University, New York.

Q. Did you take additional work after your work at Columbia? A. Additional work at Columbia?

Q. No, after Columbia. A. No, my last three years graduate work at Columbia.

Q. At Columbia University? A. That is right.

Q. After graduating and taking your master's degree, what line of work did you take up and follow? A. I was probation officer in Judge Ben Lindsey's juvenile court.

Testimony of Josephine Roche

Q. That was the noted juvenile court in Denver, Colorado? A. That is right, sir. I was later chief probation officer, and a later time referee after Judge Lindsey's juvenile court became also the juvenile and family relations court after legislation which I had initiated in the Colorado legislature.

Q. I believe you were the first woman police officer in that area? A. I think I was in the country. It was a very long time ago, sir.

Q. We will not go into that. A. It wasn't exactly the way you stated it. It was police authority to carry out an ordinance that Ben Lindsey and some of the other progressive attorneys in Denver were interested in getting through to give some woman police authority to look after the young boys and girls on the streets at night and things like that.

Q. It wasn't the kind of policeman I indicated. A. It wasn't the kind that they played up in the newspapers at the time, sir.

Q. Now what work, other work, outside of your work with this juvenile court and family relations court in Colorado—what other kind of work did you follow before you became associated with the trustees for the trust fund? A. During the three years I was doing my graduate work at Columbia, I was also working in helping in giving 2271 —having classes in some of the settlements, doing an investigation on the sweated industries in the tenements, the child labor particularly, which was very terrible at that time. I also was helping in developing in a rather small way but in a very interested way some of the programs that were being worked on even in those early days for vocational training in the public school system and for young people after public schools.

Q. Now after graduating, where did you work, after you graduated from Columbia, getting your post-graduate degree? A. My last year at Columbia, sir, was when I

Testimony of Josephine Roche

returned to Denver to become the so-called policewoman in charge, and I did that job for about a year. Then I became the chief probation officer in the juvenile court.

Q. After you were at Denver, then what? You stayed there a little while in Judge Lindsey's court? A. Yes.

Q. Did you do any work in Chicago of any special nature?

A. Then I was working also at that time, sir, on investigations that were being made by the congressional committee on industrial relations in the mining industry and later for the United States Industrial Relations Court, of which Mr. Frank Walsh of Kansas City was 2272 chairman.

The reason I mention that, my connection was quite minor, but it was special studies, and helping with the counsel who was in charge primarily of that work, Mr. Edward P. Costigan, who was our great counsel in the west and who was later United States Senator, and with whom I worked for many years.

Q. How long did you work with that Congressional Committee, or roughly how long? A. Off and on for possibly eighteen months, and maybe a little longer. It was a very long time ago.

Q. After that work was over—that was not a full-time job? A. Oh, no, sir.

Q. Just part-time? A. That's right.

Q. What other work were you carrying on? A. For several months, nearly a year, eight or nine months, I was requested by Mr. Hoover, who was then in London, Chairman of the Commission of Relief in Belgium, to go to London and work on programs for the Belgium refugees, in 1914, '15.

Q. That was the Honorable Herbert Hoover who later became President? A. That's right, sir.

Q. How long did you work with Mr. Hoover in 2273 London? A. I worked there several months, and I came back and continued working for that program

Testimony of Josephine Roche

in some of the eastern states, in developing interest in what some of the people could do to help on the refugees.

Q. Placing refugees? A. That's right.

Q. What next line of work did you have, just briefly?

A. To the best of my recollection, sir, I think I went back then—it was about 1920 when I went back again to Colorado, resuming my work as Referee of the Juvenile Court with Judge Lindsey, '20 or '21, sometime along there.

Q. Following that work with Judge Lindsey, you stayed there a little bit and then took up what? A. After that, I was back and forth to quite an extent between Colorado and New York. I had become very interested in the World War—well, I'm sorry, I am ahead of my story—in 1917—I beg your pardon, sir—in 1917, after we entered World War I—this was just prior to my going back to become Referee in the Juvenile Court—I have a terrible time remembering all of these dates—President Wilson asked me to work with his Committee on Public Information of which the three Secretaries, Ware, Navy, and State, made up the Committee, and Mr. George Creel, who was an outstanding newspaperman and had been in Colorado—
2274 I had known him very well there—was acting more or less as Executive Secretary.

I was primarily charged with the responsibility of making contacts and developing information programs among all of the great, vast numbers at that time of non-English speaking immigrants who would come over here, many of them who were not yet citizens, and of course at that time, the situation was very different from what it is now. We had great numbers of them, and I worked out, under that committee, the plan which organized and put into effect information to them in their native language on the American ideals, the American program, and also equally important, because there were so many, many Americanization programs at that time which were just telling them what they had to do instead of seeing what we needed to do for them.

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Also, the responsibility was mine to see that the many injustices, both economic and social, and all other kinds were taken up, and to the extent possible, adjustments were made.

Q. How long did you work with that committee? A. I was with that committee until I went to the Labor Department to head up the Childrens Bureau, Editorial Division, at the time of the child labor amendment. I was responsible then in 1921 or '22—'21 I think it was, sir—and I was there for about two years, and then I went back 2275 to Lindsey's Court.

Q. Now, before you went back to Colorado, you went to the United States Department of Labor? A. That's right, sir.

Q. In connection with what? The child labor laws? A. The United State Children's Bureau, which then was in the Department of Labor, was developing a great deal of public information, not only on all infant and child welfare matters, but we were working very hard with the organizations that were trying to get through the federal amendments to prohibit child labor, which eventually we succeeded in doing, thank goodness.

Q. You were there until when, you say? A. I went back, I think it was in 1923.

Q. Went back to Colorado? A. That's right, sir.

Q. When you went back to Colorado, what line of work did you take up? A. Then I became Referee in Lindsey's Court.

Q. What? A. Referee in Judge Lindsey's Juvenile and Family Court.

Q. How long did you stay there, and what next did 2276 you do? A. I was there until my father's death—his illness was one of the reasons I returned to Colorado from the Labor Department work. He died in 1926, and after his death, I inherited his holdings in the Rocky Mountain Fuel Company, and as soon as we were

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able to work out with our directors and stockholders a plan, we felt that it was very incumbent upon us to take a very definite step in the public interest, because we were all people out there at a time that who had been working in various ways—I mean the people who were working with me on the industry situation—we recognized the terrible destruction of human values and of economic values that had taken place in our state year after year, and that something if possible should be done to meet the public welfare that was involved, the deterioration in natural resources, and particularly of course to some of us the most basic thing was the conservation of human resources, so that we were able to finally agree upon a decision, make a decision to sign a contract with the United Mine Workers of America, which we did.

Q. That was the Rocky Mountain Fuel Company? A. That's right, sir.

Q. And what official position did you have, if any, with this coal company? A. At that time, I was vice-president, and I very soon afterwards became president.

2277 Q. And at that time it entered into a collective bargaining agreement with the United Mine Workers of America? A. We did, in 1928.

Q. What was the condition of the Rocky Mountain Fuel Company when you came into control of it? Not control. I mean into its executive offices. A. It was not good. The company had had a very heavy bonded indebtedness maturing in 1943. The conditions in the entire industry were bad, of course, the first beginnings of the recession, which became the depression, the Great Depression, were making itself felt. We had the problems of competitive fuels, and primarily, of course, we were over extended on this bonded indebtedness which had been put on in the early days.

Q. That was the condition when you came in there? A. Oh, yes, that was the condition when I came in.

Q. Did that result in receivership? A. It did eventually,

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but not for quite some time. We did, as a result of our union contract, improve quite substantially our productivity, because we had very definite improvement in our mine operations, but we worked continually, of course, harassed by this bond interest twice a year. April 1 and October 1, are black dates in my mind still.

And then we had the added problems, of course, of the difficulties that coal production generally was having, but we did manage to get along, and we fought through until later when we did then go—I went in voluntarily and asked for reorganization:

Q. Reorganization under the Federal Bankruptcy Act?
A. That's right.

Q. Yes. Was the Rocky Mountain Fuel Company finally wound up? A. Yes, sir, it was.

Q. Miss Roche, what was your first connection with the United Mine Workers of America? A. Only in business—only in the transaction of the contract, and that was primarily handled through Mr. Costigan, our counsel, and other men in our operating departments.

Q. In other words, Mr. Costigan, who later became a United States Senator? A. Yes.

Q. Really handled all the negotiations? A. Oh, yes, He was our counsel all along.

Q. Now after leaving Rocky Mountain Fuel, did you become associated with the Welfare Fund of the United Mine Workers? A. I did later, yes.

2280 Q. Can you tell us when you first had a connection with the Welfare & Retirement Fund? A. I was first asked to act as a consultant, technical consultant on a part-time basis, in December of 1947.

Q. That was not the present Welfare and Retirement Fund but the one under the previous contracts? A. That is right.

Q. And the present Welfare & Retirement Fund, as I

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understand, originated with the collective bargaining agreement which became effective March 5, 1950? A. That is the 1950, present fund; that is right, sir.

Q. During the period 1947 or 1948, when you first went with the old fund of the trustees, organization, what work did you do? A. Before that I was, during the years, through the end of 1934 until December, last of November in 1937, or beginning of December of that year, I was Assistant Secretary of the Treasury appointed by President Roosevelt.

Q. What was the period that you were Assistant Secretary of the Treasury? A. Three years, 1934 to 1937—I beg your pardon—that's right. 1937. And upon being made Secretary I was assigned the United States Public Health Service. It was put under my jurisdiction.

Also I was, just prior to my being made Assistant Secretary of the Treasury, President Roosevelt had appointed me on a special technical committee of citizens—appointed 21, I think there were—about, that was in May, 1937, about three or four months before I became Assistant Secretary of the Treasury—to work with programs of what eventually became the social security legislation, which we worked very hard on that. And on my becoming Assistant Secretary of the Treasury, I was then transferred from this general citizens committee to the very special government technical committee which worked with the Cabinet Committee; and sometimes represented the five Cabinet members of that committee in discussions and planning the entire social security program which became the Social Security Act.

Q. What did you do with planning and working out the social security program, or the program that became the Social Security Act of the United States and its procedure?

A. I worked constantly with the small committee that was working under the chairmanship, mostly, of Mr. Arthur Altmeyer, who was later the Social Security Commissioner

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and first chairman of the Social Security Board.

And at the same time I was working on those committees, of course I had this direct responsibility of
2282 developing the Public Health Service into a modern, progressive health program. And the first thing that we attempted there was a nationwide health inventory, which was more than 18 months and became quite outstanding in its report of that 18 months' work—it was quite outstanding in the progress, the index it gave for progress in the whole nationwide health program.

After that survey was completed—it was nearly two years—and presented to the President, the Social Security Act was in effect. President Roosevelt asked me to become chairman of his inter-departmental committee to coordinate all the health and welfare activities of the Federal Government, not only among the new activities in carrying out the federal work but to work out the most helpful—and I was pleased with the word—and the simplest and most practical arrangement with the states in developing this new program.

Q. How long were you engaged in that work? A. I continued as chairman of that committee throughout the time I was Assistant Secretary of the Treasury. And at the time I felt I ought to return to Colorado then, and in 1937 President Roosevelt wouldn't accept my resignation when I sent it in in September, but I finally made him feel that I would have to go back and tend to my coal
situation. But he asked me if I would please stay
2283 as chairman. We were developing many programs through several technical committees until 1940.

Q. All right. Let's pass to something else. Now you have told us— A. I hope I can get my dates straight. I am sorry.

Q. That is all right. I will stop you at any time I think necessary.

You told us you first became connected with the Welfare & Retirement Fund of 1947. A. That is right.

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Q. When? A. In December of 1947.

Q. Now in what capacity did you become connected with the Welfare & Retirement Fund or the trustees administering that fund? A. On that date?

Q. Yes, ma'am. A. As technical consultant in developing, to help in the development of some of the programs that they had in mine in welfare and health matters.

Q. Was that on a full time basis? A. No, sir. Part time.

Q. Technical consultant on a part time basis? A. That is right.

2284 Q. How long did you continue in your work as a technical consultant? A. Until the spring of 1948, sir.

Q. In the spring of 1948 the collective bargaining agreement or the welfare provisions of the contract of 1948 were in effect. What did you do then? A. Then I was appointed director by the trustees.

Q. You were appointed director of the Fund by the trustees. A. That is right—who were the trustees at that time.

Q. The 1948 trust fund was succeeded by the Welfare & Retirement Fund of 1950? A. That is right.

Q. Have you continued as director during that 1948 fund and through the 1950 fund up to date? A. I have.

Q. As director of this fund what are your duties generally, briefly, as director? A. As director to see that we have, of course, first primary principle, try an efficient and able staff to work in the office and on the programs; to develop procedures implementing the resolutions of the trustees authorizing benefits or in establishing eligibility requirements; carry on the day to day operations in
2285 connection with those programs, and see that the various staff members who are in charge of details of these various programs, that the work is going ahead smoothly and accurately.

Q. How much have you had, or did you have, in the earlier days and continue to have today, with setting up the entire program? A. I had quite a part in it, I would

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say, sir, at least in the sense of helping to work out certain technical arrangements as the experience I had had in the federal and state government might perhaps be of help in developing the programs.

I felt very strongly, of course, about the basic principles and policies for which the fund was created or I would have been there even as a consultant or anything else. It was aimed at developing further the conservation of human and economic resources in the interest of the public.

That is what seemed to me of terrible importance, to have a tremendously important public interest involved.

Q. Did you have any other trust fund of a like nature to guide you or did you people have to blaze a trail? A. I beg your pardon?

Q. Did you people have to largely blaze a new trail?
2286 A. We did indeed except in the sense that all of us who had cared about this public interest in the relations between management and industry had always tried to do certain things but this particular thing was entirely new. It was really an uncharted way.

Q. Who were the trustees of this fund at the time you became director? A. Senator Bridges, Mr. Van Horne and Mr. Lewis.

Q. Mr. Lewis was the man designated by the union? A. Union.

Q. Mr. Bridges was the man designated by whom? A. Well, he was supposed to be the neutral trustee.

Q. Who was Mr. Van Horne designated by? A. He had been designated by the operators.

Q. By the operators? A. That's right.

Q. Have there been changes in the trustees since that time? A. Yes..

Q. What trustees have left and what have been added?

A. Mr. Charles Owens was designated in the 1950 fund by the operators. He served until his death, I think it was

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in July of 1957, at which time Mr. Henry Schmidt,
2287 president of North American, was designated by the operator group.

Q. Do you recall whether 1958 or 1957, Miss Roche? A. I am sorry. It was 1958. I am so sorry.

Q. And Mr. Owens died— A. And Mr. Owens died in 1957 and Mr. Schmidt was not formally seated until early 1958.

Q. And he was selected by the operators? A. That is right.

Q. Did you become a member of the board of trustees? A. I was a member of the board of trustees in the 1950 contract named by the other trustees in the contract.

Q. Perhaps I should go back and ask you how, if you know, was Senator Bridges chosen for membership? A. I couldn't tell you anything about that firsthand. I heard various reports but I could not say.

Q. But anyway, he was the neutral member? A. He had been under the 1948 fund, that is right.

Q. Of the 1948 fund. A. That's right. I succeeded him as the neutral trustee.

Q. And you were named, I believe in— A. 1950, the 1950 contract.

2288 Q. The record is already in here and shows you were named in the 1950 contract when it was signed?

A. That is right.

Q. And you have continued as trustee since that time?

A. That is right.

Q. Miss Roche, how frequently do these trustees meet?

A. Four or five times a year.

Q. Where is the office of the trustees of this Welfare & Retirement Fund? A. 907 15th Street.

Q. Washington, D. C.? A. Washington, D. C. Headquarters.

Q. Do the trustees own or do they rent a building there?

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A. The trustees rent the building. There are really two buildings, seven-story buildings connected.

Q. They pay a rental for those buildings? A. They do.

Q. Do you know what that rental is? A. I think it is around \$200,000 a year.

Q. From whom is that building or those two buildings rented; who owns them? A. The United Mine Workers of America.

2289 Q. And do you have—I say “you”, I mean the trustees—have the entire building or is there a part of it rented to somebody else? A. We have six floors of one building and the entire seven floors of the other. The ground floor of one of the buildings is rented to other people.

Q. Other tenants? A. Yes, sir. Small shops there.

Q. How do you determine the amount of rent? What procedures do you follow to determine the amount of rent? A. It is constantly checked to make certain it is in line with prevailing rents in the downtown district of Washington.

Q. And have you kept paying the rent that was prevailing in the commercial area there where you are located? A. That is right.

Q. Is that rental paid monthly? A. Monthly.

Q. To the United Mine Workers of America by the trustees and out of the trustees' funds? A. It is paid by the trust fund; yes, sir.

Q. You told us a minute ago that the trustees met four or five or six times a year. Where are those meetings
2290 held? A. In the offices of 907. There is a special room for the trustees, offices there, and they meet there regularly.

Q. And are they attended as a rule by all three of the trustees? A. Yes, that is right.

Q. Who, if anybody else, attends those meetings? A. Counsel to the trustees, Mr. Val J. Mitch; comptroller of

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the fund, Mr. Thomas Ryan, and I attend—well, I am trustee—

Q. You are one of the three trustees? A. Also attend as director.

Q. How long do those meetings last that you have? A. Two or four hours. Sometimes only about two, but very often longer.

Q. What is the nature of the business that you transact at these meetings of the trustees? A. The minutes of course are read.

Q. That is the minutes of the previous meeting? A. Minutes of the previous meeting are read.

Q. Incidentally, who keeps those minutes? A. Counsel to the trustees, his secretary. He acts as secretary of the board.

Q. That is Mr. Mitch? A. Mr. Mitch, that is right.
2291 The minutes of the previous meeting are read and discussed, the action taken on them. The group is given a full report by the counsel of all legal matters and the litigation that the fund—against the fund or the fund is carrying through, and any developments of any legal nature which the trustees would not only be obligated to know about but would be interested in.

After that report of counsel, the comptroller—

2292 Q. Before we leave that report of counsel, you said that counsel reports on various items in litigation. Does he report on the suits that have been instituted for the collection of unpaid and past due royalties? A. Always, completely.

Q. In detail? A. In complete detail.

Q. Does he give the names of the companies? A. He does. Amounts.

Q. Names of the companies, the amounts and the courts? A. That is right, and the state of the litigation.

Q. And as these suits progress from time to time, does he make reports? A. He does.

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Q. Stating the progress of the various items in litigation?
A. Yes, sir, every meeting.

Q. When they are finally concluded, does he make a report? A. He does.

Q. Do you people as trustees point out a particular company that happens to be delinquent in its payment of royalties and designate to him, to counsel, that he shall bring suit, or how is it handled? A. By resolution of the
2293 trustees, place him under the responsibility of following through on all delinquencies on which no arrangements can be satisfactorily made to assure complete payment, and there has never been a case that has not been pressed to the very end on complete payment. And if it is, in his judgment, that is required, he is authorized to bring suit and immediately report at the next meeting on the status.

Q. Do the trustees single out particular coal companies, say small ones, and designate that counsel shall institute a suit against this company or that company? A. No.

Q. Has that ever been done? A. No, not to my knowledge, sir, since I have been trustee.

Q. Has there ever been any discussion by the trustees that you know of in meeting or otherwise that suits were to be instituted against particular coal companies for any other purpose than to collect the money that they owe? A. No, sir, definitely, positively no.

Q. Has there ever been any movement as far as you know of the trustees to impose upon or work a hardship on any company? A. No, sir, none whatsoever.

Q. And now you mentioned a moment ago with reference to the settlement, what about the attitude of the trustees with reference to giving away, to refusing to
2294 collect a part of the money that may be due under their signature on the contract? A. It is never permitted, sir.

Q. What do you do with it? A. We continue until it is litigated in court.

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Q. Do you exert every reasonable legal effort to collect it? A. We certainly do.

Q. Is that true regardless of the company or the location? A. Regardless of the company or where it is or anything about it.

Q. And Mr. Mitch, himself, is responsible for the handling of those claims? A. He has the responsibility. Of course, he has very remarkable assistants in it, but that is his personal responsibility, yes, sir.

Q. He does, of course, have associate counsel or assistant counsel working under him or working at his direction? A. That is right.

Q. Miss Roche, what types of benefits are paid by the trustees from the fund? A. Pension benefits, hospital and medical care benefits, funeral expense, survivors' benefits, and the very special, not so large but extremely important special benefit to mine disaster widows and survivors.

Q. Are there different heads of the different divisions, one that looks after pensions, say, and one that looks after hospitalization benefits and another that looks after these disaster benefits and so on? How are they handled? A. We have an entirely remarkable system and entirely unique in the world, to say nothing of this country, on hospital and medical care benefits. It is headed by one of the great medical experts of the country, the deputy surgeon general, Warren F. Draper. He has complete and final decision on all medical matters. His standing is internationally recognized. He has ten area medical offices distributed throughout the coal mining areas working under his supervision. The medical service does not have anything to do with the decision as to who is eligible for the hospital and medical care.

Q. What does the medical service under his supervision— A. It provides this tremendous volume of quality hospital and medical care and in that it is very, very unique because

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we have stressed from the inception of the program,
2296 which is one of the first we got going in 1948 when

Dr. Draper joined us as the executive medical officer of the Trust Fund, that we would furnish the authorized benefits or benefits authorized by the trustees, but the quality of medical and hospital care had to be good, had to be the best we could get for our beneficiaries, and it had to be at a cost that was reasonable as determined by professional standards, and that has been a 12 or 13 year record of which I don't think there is anything we are prouder of, because there have been tens and tens of thousands of babies' lives saved, mothers' lives saved, of cruelly crippled, disabled men who have been left to die in the mining communities who, through the rehabilitation, have been again brought back to at least self—being able to take care of themselves, and many of them to be re-employed after vocational training under the government program.

Q. In connection with these medical services, have the trustees established hospitals? A. The trustees have arranged through loans to Miners Memorial Hospital Association for the construction of ten hospital chains in Kentucky, Virginia and West Virginia. That was arranged by the trustees some years ago, because unless we did that, there was no other way of getting the kind of quality of care and provision for the vast numbers of people who were beneficiaries of the Trust Fund in those communities and states.
2297

Q. Since the establishment of those hospitals, they have continued to be operated? A. They have, indeed.

Q. Now you mentioned disaster relief benefits. Would you go very briefly into that for us so we can see what you do? A. Those are financially not as extensive, of course, as the other benefits, but whenever there is a man killed in a mine, whether it is one or two or whether it is what they call a major disaster that we hear about — they get great publicity, but the small killings aren't so much in evidence—

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we provide—the thing is sudden and even when compensation starts a little later and social security starts, there is a brief period there of agony, apprehension and fear of paying the grocery bills and this, that and the other. We have our own very highly trained and experienced field staff who go out on all our benefit programs to do two things, to check and make sure that eligibility is fully met before any money is paid on the benefit. We do that, the fund — nobody else can do that — in addition to that, to make certain that every human agony is met by giving a man an opportunity to prove his eligibility.

That staff, when there is this kind of disaster, have been authorized by the trustees to go instantly, and they
 2298 do — I get a telephone call at twelve o'clock at night sometimes, or early in the morning about a disaster, and the very fine young man that heads up this field staff instantly has one or two of his boys, depending on the number, the extent of the accident — they are there and they are authorized to give a few dollars, up to a hundred dollars, right in cash. You don't give them checks. It is right there. It is money in their hand, to meet the grocery bill or the immediate needs. Sometimes it is clothes for the children to go to the funeral.

I say it is important because of the psychology, not so much in the money.

Q. Tell us about the pension fund, please. A. Yes, sir. Where do you want me to start?

Q. Start and tell us briefly about what the pension
 2299 is and how you handle it. A. The pension program was started, the first pensions were paid in September 1948. That was shortly after I became director, and the months between my appointment that spring of 1948 and the first pension payment on the program we worked out were devoted entirely, and I might add night and day, to working out the kind of arrangements and the application forms and all the details by which —

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Q. Let's pass on because the '48 fund is out of existence and really not involved in this, and let's come to the 1950 fund and how you handle it now and in the last six or eight years? A. Fine.

Q. Please. How have you handled the pension fund and in what way is it administered and to whom paid? A. The fund is administered by the administrative staff of the fund in conformity, complete conformity with the resolutions of the trustees authorizing the pension benefits. That means, of course, that we are responsible for seeing that the amount of the pension and the arrangement for payments both go through absolutely without any slip; that the eligibility of every applicant is fully — we are fully satisfied as to his eligibility and that —

Q. Speak a little louder. A. I am sorry again. And that anyone who is ineligible does not receive the 2300 pension. We have already authorized about and there are now being paid about 66,000 pensions.

Q. You mean there are about 66,000 people, former miners? A. That is right.

Q. Receiving pensions today? A. About that number. It changes every day, of course.

Q. There are, of course, many others whose pension payments have been expired by death and so on? A. By death, yes.

Q. Ordinarily, how long do the payments of these pensions continue? Do they continue for life, until death? A. Oh, yes, they continue until death.

Q. Are those pensions on a uniform amount per month? I mean is there a difference in the rate of pension to a former miner who lives in Pennsylvania, or Ohio, than one who lives in Tennessee? A. No, sir, they are all the same, in addition to the social security payment they may get.

Q. And the fact that the pensioner receives social secur-

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ity, does that in any wise enter into his pension
2301 claim? A. No, sir.

Q. Something has been said in this record, Miss Roche, that pensioners have at times been on picket duty lines where there was an organizational strike or an organizational movement perhaps, not strike but movement on foot by the union to organize a mine. Have the trustees ever at any time instructed or directed pensioners to be on picket duty? A. Never.

Q. Have you ever heard of them being instructed or directed by the trustees or with the authority of the trustees to go on picket duty? A. Never.

Q. Has there ever during all the time that you have been connected as a trustee been a rule or regulation that if a pensioner did not go on picket duty, his pension would be dropped? A. No, sir.

Q. To your knowledge has anything of that sort ever happened? A. As far as the fund is concerned, never, sir.

Q. Have you ever had any complaint by any one that it has happened, if they refused to go on a picket line?
2302 A. No.

Q. Nothing of that sort to your knowledge, and you have been there all the time? A. No, sir.

Q. And you do attend, you have said, practically every meeting of the trustees? A. I attend every meeting. I make no exception.

Q. You have here in front of you, I see, a number of files that I want to pick up. Something was said in this record that benefits depend upon membership in the union of the person who receives such pension benefits. Is that correct? A. No, sir, it is not correct.

Q. Has at any time since 1950 when the trust fund of 1950 was established union membership been a requirement for pension benefits? A. No, sir.

Q. Never? A. No, sir.

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Q. Has there ever been any action taken by the trustees since the establishment of the 1950 trust which would require membership with or affiliation to the union as a basis for benefits? A. No, sir.

2303 Q. Miss Roche, does the United Mine Workers of America Welfare and Retirement Fund publish an annual report? A. It does.

Q. This Fund began in 1950 according to the record here. I ask you if you have present here copies of the annual report as published by the fund beginning with the year 1950 and running through 1958? A. This first document is the summary of the previous funds and the report of the fiscal year 1951. '50 — we were only three months, four months in existence.

Q. So in other words, the effect — A. Those months were all audited and it is a summary of the four years. After that every year they have been published.

Mr. Kramer: I want to file this report of June 30, 1951 as Exhibit 128.

(Exhibit No. 128 was marked for identification and filed.)

Mr. Kramer: The 1952 report as Exhibit Number 129.

(Exhibit No. 129 was marked for identification and filed.)

Mr. Kramer: The 1953 report as Exhibit Number 130.

(Exhibit No. 130 was marked for identification and
2304 filed.)

Mr. Kramer: The 1954 report as Exhibit Number
131.

(Exhibit No. 131 was marked for identification and filed.)

Mr. Kramer: The 1955 report as Exhibit Number 132.

(Exhibit No. 132 was marked for identification and filed.)

Mr. Kramer: The 1956 report as Exhibit Number 133.

(Exhibit No. 133 was marked for identification and filed.)

Mr. Kramer: The 1957 Report as Exhibit Number 134.

(Exhibit No. 134 was marked for identification and filed.)

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Mr. Kramer: And the 1958 report as Exhibit Number 135. (Exhibit No. 135 was marked for identification and filed.)

Mr. Kramer: Now Your Honor, while we do not feel that the years '59 and '60 are material, but in view of the fact that evidence has gone in, and subject to previous exceptions, but so as not to waive any rights, I also file '59 report as Exhibit Number 136.

2305 (Exhibit No. 136 was marked for identification and filed.)

Mr. Kramer: And the 1960 report as Exhibit Number 137. (Exhibit No. 137 was marked for identification and filed.)

Q. I notice in the 1951 report, as Appendix A, which follows page 17, there is a report of the Certified Public Accountants, Wayne Kendrick and Company.

Is there an annual audit made of the finances of the Welfare and Retirement Fund by certified public accountants?

A. Every year, yes, sir, there is. It is extensive.

Q. And is the report for that current year shown 2306 in these various reports that these ladies and gentlemen of the jury now have? A. Each annual report contains a reprint in full of the auditor's report. Of the independent certified —

Q. These are independent certified public accountants, not in any wise connected with the fund? A. Not at all. Wayne Kendrick and Company.

Mr. Kramer: I refer particularly to — I'll take just an illustration, Your Honor. I am not going through all of them, it is too tedious, but if I may, I will make statements, and counsel will check them, because you have copies, and I am now picking out just at random — I can pick out of the others, but the '54 report, and it is on page, Your Honor, page five of '54.

That page, I believe sets out — I am going to state it, Your Honor, and if counsel desires, they can follow it, so as to shorten this matter.

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The Court: Yes, sir.

Mr. Kramer: This page, Your Honor, sets out the summary of the benefit fund and starts on page five. Somebody there has this very one in their hand on the jury now.

Similar language, Your Honor, is in others, not always verbatim the same, but practically the same in every 2307 one.

The amount of pension benefits were paid during the fiscal year on the particular year I happen to hold in my hand, the pensions paid during that preceding fiscal year — page five, Miss Roche — was \$64,092,309.10.

Sixty-four million, ninety-two thousand. And as of June 30, 1954, there was 54,937 aged, retired miners receiving this benefit, which at that time was a hundred dollars a month, and I want to read the next paragraph, Your Honor.

“Trust Fund — ”

And whoever may have this one may follow me there.

“Trust Fund regulations governing authorization of pensions are the same as outlined in last year's Annual Report. These regulations require an applicant to be sixty years of age or over at time of application for pension, to have completed twenty years of service in a classified job in the coal industry within the thirty years immediately preceding the filing of an application, to have been regularly employed in a classified job in the coal industry immediately prior to May 28, 1946, and to have retired from a classified job in the coal industry after that date.”

2308 By Mr. Kramer:

Q. Are those the requirements for pensions? A. Substantially the same today, sir.

Q. And have been since 1955? A. Yes, sir.

Q. And I note there is no reference whatsoever to membership of any local union or to any union of the United Mine Workers of America. A. It is not a requirement, prerequisite for eligibility, sir.

Q. And these requirements for eligibility for pensions are published year by year? A. That is right.

Q. In these annual reports? A. That's correct, sir.

Q. Now, tell us about the distribution of these annual reports. A. The annual reports, immediately upon their publication, which is generally about the middle of August or the first of September after the audit is through — that is about thirty days — are circulated immediately, mailed in this form to all operators signatory to the contract, to the district and local offices of the United Mine Workers of America, to all federal and state agencies interested in — the state agencies in the coal-mining areas — to all federal agencies, all the departments and the special divisions of the department that would be interested in any way in any of the programs, to libraries, to large and extensive lists of professional people, both medical, hospital, and legal, to state universities, all state university libraries, and to all technical institutions interested in the work, and to a very extensive mailing list of interested individuals of some approximately, as I recall, about thirty thousand, and anyone requesting a copy of the report may receive it, of course. It is a public property.

Mr. Kramer: I want to turn to the 1955 report and read a statement or two that is there, Your Honor, and I refer now, gentlemen, to page five. "In discharge of their legal obligations, the Trustees recognize the following mandatory eligibility requirements:"

We are talking about pensions.

"Miners applying for a Fund Benefit — "

These are all benefits.

" — must prove that they are presently employed, or were last employed in coal mining, in a classified job by an operator signatory to the Agreement under which he is obligated to pay tonnage royalties to the Fund, and that such employment was subsequent to the date the first Fund was established. Widows and survivors of deceased miners

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applying for a Benefit must prove that the deceased
 2310 miner was last employed in a classified job by the
 operator signatory to the Agreement subsequent to
 the date the first Fund was established. Additional eligi-
 bility requirements as established by the Trustees in their
 discretion govern the various Benefits, and are subject to
 Trustee revision at any time.

"All eligibility requirements must be fully satisfied before
 a benefit is authorized. No benefit is authorized solely on
 the basis of union membership.

"Determination of eligibility can be made only by the
 Fund after an application and all required evidence is re-
 ceived from the applicant, on whom the burden of proving
 eligibility is placed by the Trustees resolutions. No appli-
 cant is eligible for any Fund Benefit until his eligibility has
 been thus determined by the Fund and the Benefit author-
 ized; no retroactive payments are made for any benefit."

Now, I turn over, Your Honor, to page six of this same
 report.

Application forms — "

And these are application forms for benefits. Someone
 in the jury box holds the report I am reading from, June
 30, 1955, and I am reading from page six. "Application for
 Benefits", two-thirds of the way down the page.

2311 "Application forms covering the essential data
 required for each benefit authorized by the Trustees,
 and instructions as to the necessary documentary evidence
 to be submitted, are prepared with utmost care by the tech-
 nical and administrative staff, printed and made available
 to all who desire to submit to the Fund an application for
 a benefit. Distribution of the application forms is made to
 all District and Local Union Officers of the United Mine
 Workers of America for servicing their members in filling
 out applications and submitting them to the Fund for its
 consideration and determination of their eligibility. Indi-
 viduals writing directly to the Fund in regard to Benefits are

instructed as to filing procedures and eligibility requirements."

2312 I will read just one sentence from page 28 of the 1959 report. This is in all of them. I don't want to take time to try to dig it out. I am reading from page 28, the last sentence in the paragraph in the lefthand column. This is in the year ending 1959. Let's go ahead without digging them up. It is in the others but I won't take the time to dig it up.

"Trust Fund Benefits are not authorized on the basis of union membership, but only in conformity with Trustee regulations; all eligibility requirements must be fully satisfied before a Benefit is authorized."

And on the next page of the same report is this language — and I am reading the first paragraph on page 29, your Honor, and this is the 1959 report.

"Application forms covering the essential data required for each Benefit authorized by the Trustees, and instructions as to the necessary documentary evidence to be submitted, are prepared with utmost care by the technical and administrative staff, printed and made available to all who desire to submit to the Fund an application for a Benefit. Distribution of the application forms is made to all Districts and Local Unions of the United Mine Workers of America for servicing their members in filling out applications and submitting them to the Fund for its consideration and determination of their eligibility. Individuals writing directly to the Fund in regard to Benefits are instructed as to filing procedures and eligibility requirements."

Now similar language, your Honor, is in all of these exhibits. I do not want to take the time to burden the record with it.

Q. Miss Roche, there has been raised in this case a ques-

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tion about people, miners, who have retired and who are not members of the union are not entitled to benefits.

I believe somebody on behalf of the trustees, not you, filed an answer to an interrogatory about difficulty in digging out records.

I will ask you if at my request recently you have had your staff go in a part of the files and get some of the files showing where benefits were paid to people who were 2314 not union members? A. Yes, sir.

Q. I believe the ones that I have in front of me from the files are files, one file for each year, beginning with 1954 and continuing through 1959. A. That is correct.

Q. Are these the full, complete and exact files as they came from the thousands of files you have? A. They are.

Q. How are these files kept, so we will have some idea of the difficulty of someone in things of this sort? A. They are filed alphabetically, and, also, of course, as soon as an application reaches our business mailing room it is given a number and sent right up to the auditing office. They are alphabetical files — they are filed alphabetically and the number of the application forms give some intimation, roughly, very roughly, about the time. Because the lower the number the further back they are, and the bigger the number the more recent they are, is the only way I can state it very — not very accurately.

Q. I find that the one, the first one I have on top, is number — is this the number up here? A. Yes, sir.

Q. It is a red stencilled number? A. That is right.

Q. And this first one that I have seems to bear date 2315 of May 10, 1955. A. 1955, that is right.

Q. And what is the number on that file? A. Pretty dim, 78169.

Q. And on the last one, which seems to be, December, 1960 — A. 104758.

Q. That would be one hundred four thousand, seven hun-

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dred fifty eight? A. There are tens of thousands of documents in our files — of these folders in our file.

Q. Is any effort made to keep them separated as to those that apply that are members of the union when they make application and those that apply who are non-union members? A. Certainly not.

Mr. Kramer: I want to take up, your Honor, the first one here, which is marked "noted May 10, 1955". This file — and this seems to be a fellow — the file of a man named Clem, C-l-e-m, Terreo, T-e-r-r-e-o, and I want to file this entire file as Collective Exhibit 138.

I want to ask counsel to agree if we may withdraw these files and reproduce exact copies and put them in the record at the close of the testimony.

2316 Mr. Rowntree: That will be perfectly all right.

(Exhibit No. 138 was marked for identification and filed.)

2317 By Mr. Kramer:

Q. The application that we started to talk about just before the recess was made by a man whose name is Clem Terreo, and his address is Eccles, West Virginia, I believe. A. That is right.

Q. Now under this file he wrote for a set of the regulations —

Q. — set of regulations showing information with reference to the welfare fund, and his original letter was dated what? Let's see if it was dated. Dated January what?

2318 A. 18th, 1955.

Q. 1955. Now was a pension granted on that application? A. That date is the letter I wrote him.

Q. I beg your pardon? A. His letter was written January 6th, 1955.

Q. And you acknowledged receipt — A. And I replied on that date, January 18, 1955.

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Q. Was he granted a pension? A. He was.

Q. On what date was the final action taken and the pension granted? A. Pension was authorized May 4, 1935.

Q. I note a communication from you to him dated February 4th, 1955; is that correct? A. That is right.

Mr. Kramer: I want to read this communication, your Honor.

"This will acknowledge receipt of your letter of recent date requesting forms and instructions for making application for Fund benefits.

"We are enclosing forms on which you can furnish us with information necessary to ascertain your eligibility for Fund benefits. Please fill out all of the blanks on Form

DO-1 listing all data requested to the best of your knowledge; also complete the Previous Employment

Record listing your service in the coal industry year by year beginning with 1925 and continuing until your retirement.

"As certification of your service prior to 1937, you are required to obtain, if possible, a statement from each company with whom you claim employment. These statements should outline the exact dates of your employment and give your job classification. To be acceptable, it must be written on official company stationery and signed by a responsible representative of the company. If a company statement cannot be obtained, you must explain why this is not possible. In addition to company statements, it is required that you submit at least two forms 14-P for each period of employment claimed before 1937. These forms must be completed only by persons who actually worked with you.

"Please return the completed forms to this office together with documentary proof of your age. It is necessary that the Preliminary Application form be signed before a Notary Public. We shall communicate with you at a later date regarding your status.

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"Sincerely yours, Josephine Roche, Director, UMWA Welfare & Retirement Fund."

2320 This is a copy of her reply, which is in the file, your Honor.

By Mr. Kramer:

Q. Then there is in the file a letter — not a letter but a form authorizing you to obtain, the trustees to obtain the information from the Social Security people with reference to his earnings and employment? A. That is right.

Q. And there is in the file a report furnished to the trustees by the Social Security people? A. Correct.

Mr. Kramer: Then there is in the file completed forms of the ones referred to in your letter giving the dates of employment, names of the coal companies by whom he was employed beginning with '25 and running through '36, and showing the various periods of employment and the number of the mine and the location.

There is also included in this a paper returning to you a communication from one of the coal companies that he was employed — that is the Eastern Gas and Fuel Associates, Coal Division, dated February 8, 1955, and states that they have checked their payroll records in order to determine the length of service at the Eccles mine, and they give the date.

2321 Mr. Rowntree: May I inquire just on the form, just before the letter there, does it inquire as to the local union number?

Mr. Kramer: No, sir, the form does not. I will read the whole thing.

This is a statement by a man who has worked with him, and the form says:

"Certification in Support of Employment Before 1937.

"I, H. J. Clay, live at Eccles, West Virginia, and was born on May 30, 1891, I am not receiving benefits from the U.M.W.A. Welfare and Retirement Fund."

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And then it says, "If receiving benefits, my file number is" blank, and there is left a blank here.

"I am still working in the coal industry. My present employer (if still working in the coal industry) is Eastern Gas & Fuel Associates located at Eccles, West Virginia. My Social Security Number is 236-05-6296. I first became acquainted with Clem Terro, the applicant name above, on or about November, 1910.

"The applicant worked with me as follows: (List Employment for Each Year on a Separate line)."

2322 Then on the first line the heading is "year", under it "1925", "From" "To", January, December; "Name of Coal Company", "Crab Orchard Improvement", "Location of Coal Company, Town, State, Eccles, West Virginia, Mine No., 5 and 6, Local Union No." and it is that one that is blank.

That is, this person who is making the statement left it blank.

And then "Type Work, Armature Winder." The same is true down to the year 1934, being a line for each year, and in 1934 where it says "Local Union No." this man who is making the proof, says that he then was a member of Local Union 5770.

Mr. Robertson: This is an employment record of the applicant; is that correct?

Mr. Kramer: No, here is what it says. The applicant — this man is filing this statement to support this applicant's request for pension, your Honor, and he is submitting a statement from this man, H. J. Clay, and H. J. Clay says that he worked with the applicant — Mr. Terreo, whatever his name is, Terreo, "I worked with Mr. Terreo at this mine during these years." And then he said that "I am a member" --

2323 Mr. Robertson: They are not concerned with the detailed employment.

Mr. Kramer: You may point that out, if you wish

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on cross examination, but I have no objection to pointing out where it says that the applicant was a member of the union. He may have been. I don't know.

2324 Where it says "Local union member", what it says was "The applicant worked with me as follows," then he says and gives the date and place. I don't know whether it means the applicant or the affiant. One of them had belonged to the union, maybe both of them, I don't know. But that was back in 1935 and '36.

There are two copies of that same form in here, your Honor.

Then there is another form submitted by the man himself, gives his employer year by year, beginning with 1916 and running to the time he quit work in the mines, 1946, and he gives the months that he worked, the name of the company he worked for, the location of it, the job he held, and which says nothing at all about the union for anybody on there, one way or the other.

There is included, your Honor, the birth certificate. There is a statement of this claimant again, and I guess maybe in view of the question raised, I should read it in full.

"Preliminary Application. Information about Miner." And this is the one he signs himself.

"Name: Clem Terreo. Social Security Number: 233 12 2155. Address: Eccles, Raleigh County, West 2325 Virginia. Date of Birth: September 6, 1889. Place of Birth: Italy. Is miner a member of the United Mine Workers of America? Not at present time. If 'yes', list local union number and district number," and those are blank.

"Is the miner presently employed? No.

"If 'yes', name of company. Job classification." Both of which are blank because he is not employed.

"Place of last employment in the coal industry: Eccles, West Virginia.

"Dates of last employment in the coal industry, from November 1916 to June 12, 1946."

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And then it asks for a list of all employment since leaving the coal industry. It says he worked in a block plant from 1946 to 1954, and signed by him and sworn to.

A letter of transmittal of these forms, letter of inquiry to know whether or not the job armature winder is within—if employed as an armature winder is classified under your district contract, because under the collective bargaining agreement the provision is in there, not union agreement.

A response from the local union telling that it is, and the local union says this about the man:

"In reply to your letter of March 2, 1955, concerning the work performed by Mr. Clem Terreo of Eccles, West Virginia, between 1924 and 1946, please be advised that the classification as an 'armature winder', which he was doing during this time is considered covered employment under the Contract in this District.

"It is our information that Mr. Clem Terreo left the mining industry on June 12, 1946, and since that time operated a dairy, hauled mine timbers, operated a saw mill, and last operated a cement block plant. During this time he failed to maintain his membership in the United Mine Workers of America.

"Sincerely yours, George J. Titler, President, District 29, UMWA."

The other correspondence, and I am not going to take time to read it but which may be read, of course, later, and under date of May 4, 1955, this letter which tells him definitely he had not been a member of the union since 1946, and under date of May 4, 1955, he was awarded a pension, though not a member of the union.

We have there, your Honor, the application of Steve Molnar, Mo-l-n-a-r, which was filed on or at least sworn to on June 4, 1957. That is the only date that seems to appear there.

The Witness: Received August 29, 1957.

2327

Mr. Kramer: But one of the departments investigated and says in August '57, and to which is attach-

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ed the correspondence and the final award of pension to this man on August 29, 1957. This file sets out, your Honor, that this man was not a member of the union, and I will read that part.

Mr. Rowntree: That is one of these files you had over here?

Mr. Kramer: Yes, sir, it is one of the files you had there. I picked up the ones you had there. You had all of them there.

And I ask this file be marked as Exhibit 139.

(Exhibit No. 139 was marked for identification and filed.)

Mr. Rowntree: Your statement that he was not a member of the union

Mr. Kramer: Do you want the proof that is in here?

Mr. Rowntree: Does that mean he never was a member?

Mr. Kramer: Oh, no. Some of these may have been member's one time and not members at another, but they were not members of the union, your Honor, at the time they made application, and I think all of them, unless there was one, was not even a member at the time he last 2328 worked. The one I read a minute ago hadn't been a member in nine years. At one time he had been a member, but he hadn't been a member in nine years.

Mr. Rowntree: If your Honor please, these files just came in today. Counsel wanted to withdraw them to copy. I wanted to make sure to get them back.

Mr. Kramer: I am perfectly willing to let you have them over the week-end, as far as that is concerned, and we will withdraw them the first of the week and copy what we want. If you want the original files, your Honor, over the week-end, counsel may have them.

Mr. Rowntree: I just wonder how long is it going to take to copy them. Do you have any idea?

Mr. Kramer: It won't take very long. We will try to have someone make photostatic copies and reproduce them.

If you don't want us to take them and you want to keep

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them over the week-end, you may keep them over the week-end, just so we get them back for Monday, I am willing to do that, or have the copies made tonight. I don't want to work all night on the stuff, but we will have the copies to you some time tomorrow. Either way you want to handle it.

Mr. Rowntree: Copies will be all right, if we get them the first of the week.

Mr. Kramer: All right.

In connection with this application of Mr. Molnar, which is Exhibit 139, I will ask you what this application shows of his last employment. This is his form and I am not going back on all of it which goes back to '27 and shows the coal companies and so on he was employed by, but it shows that his last three employments were from 1951, March, to September 1951 by William L. Driskill, a farmer not a coal company. His next to the last employment was in February 1951, Mrs. Walter Winkenverder, W-i-n-k-e-n-v-e-r-d-e-r, not a coal company, as a gardener. The next employment, which is the last one he had prior to filing his application was from September 1952 to September 1956 by the Maryland Casualty Company.

We reserve the right to call the attention of the Court and the jury to other portions later on to avoid wasting time

I will file as Exhibit 140 the file of John Shenkarik, S-h-e-n-k-a-r-i-k.

(Exhibit No. 140 was marked for identification 2330 and filed.)

Mr. Kramer: And filed --

The Witness: Filed April 12, 1956. That is 2, April 2, 1956.

By Mr. Kramer:

Q. Was pension granted to this man? A. Yes. Terminated.

Q. Terminated, I believe, by death, according to this report? A. That is right.

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Q. In March — no, in January? A. January 25, 1961.

Q. There seems to be a letter in this of advice from some insurance company with reference to the date of his death and so on, is that right? A. I wouldn't wonder. We had much communication from the insurance companies. They love to run your business, off the record.

Q. Did you give the date it was filed? A. I said April 12 but it is April 2.

Q. What was the date of the authorization for pension in that case? A. April 4, 1957.

Q. There was a large volume of correspondence in this case? A. Very large.

2331 Q. To show qualification and so on. There seems to be an indication that at first this claim was disallowed and then later it was allowed? A. That is right.

Q. What was the reason for the denial or disallowance before it was reconsidered and allowed? A. He had not adequately established proof of age, 60. He also had not established proof of 20 years' classified service in the coal industry within the 30 year period immediately preceding the date of his application, which is one of the basic requirements for eligibility. He also had not at the time of the first denial, had not established proof of employment of an operator signatory to the National Bituminous Coal Wage Agreement at the time of retirement.

2332 Q. It is a requirement, I believe you mentioned earlier, that at the time a man leaves the mining industry in order to be eligible for these benefits; he must have been employed by a signatory to the contract. A. That is correct, sir. The whole basis is the employee-employer relationship of the signatory ---

Q. That is the provisions --- A. Of the Taft-Hartley Act?

Q. Which you have to carry out? A. Scrupulously, with the terms of the trust agreement, and the contract adhered to.

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Q. Now, the three grounds for disqualification that you read were later met? A. They were.

Q. As shown in this correspondence? A. That's right.

Q. And they were awarded? A. Yes, after the additional data requested by the correspondence that was submitted.

Mr. Kramer: I have another file here of Rico Boggio which I want to introduce as Collective Exhibit Number 141.

(Exhibit No. 141 was marked for identification and filed.)

By Mr. Kramer:

2333 Q. What was the date that this application of a non-union member was filed? A. Non-union beneficiary.

Q. Non-union beneficiary, yes, ma'am. He would hardly be a non-union member, would he. A. 5th of November, 1958.

Q. And what was the date that he was awarded his pension? A. 4th of December, '58.

Q. Filed his claim or application in November and was awarded his pension --- A. That's right.

Q. --- in December, 1958? A. That's right.

Q. And this file discloses that he was not a member of the union? A. That is correct.

Mr. Kramer: Correspondence and so on is in it, Your Honor, and we pass it to the jury.

The next file that I want to use here is the file of Robert Taylor, file it as next Collective Exhibit.

(Exhibit No. 142 was marked for identification and filed.)

By Mr. Kramer:

2334 Q. What was the date that this application was filed by Mr. Taylor?

It should be right here.

A. I know, but it doesn't always. You have to look at two places.

May 28, 1958.

Q. Was this pension granted? A. It was.

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Q. What date? A. On the 24th — the 24th of April, 1959.

Q. And the information with reference to this file — with reference to this claim or applicant is all set forth in here?

A. Exactly. Everything about it in every one of these cases is in this file.

Mr. Kramer: And now the last one that we are going to file is the application of Thomas Liddle, mark as next Collective Exhibit.

(Exhibit No. 143 was marked for identification and filed.)

By Mr. Kramer:

Q. What is the date this application was filed? A. The date of receipt is here.

Q. That is the audited receipt? A. Yes.

2335 Mr. Kramer: I am not going to waste time hunting that. It is in here, but we can't make it out.

The Court: All right.

By Mr. Kramer:

Q. When was this pension granted or allowed, authorization? A. December 1, 1960.

Q. And this is another person who was not a member of the union and who received pensions from the Welfare Fund? A. Direct application to the Fund, that is correct.

Q. Made his own individual application? A. That's right.

Q. And received pension on his application? A. That is correct.

Q. Miss Roche, has Mr. Lewis, during the period that he served as president of the United Mine Workers of America, or at any time since then, attempted as a president of that organization, or president emeritus of it, sought to control the handling of the trust so far as you are aware? A. No, sir, never.

Q. Has he dictated policy any more than the other trustees so far as you are aware? A. That has always been done by the three trustees in formal session, together, not
2336 by him.

Q. Have you people — well first, you, yourself —

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have you as a trustee, in passing upon claims for benefits of any kind, whether they are pensions, hospital, catastrophe, or any other kind attempted at all times to follow out the provisions of the law and the trust agreement? A. Absolutely, sir.

Q. Without deviation, because you have union membership and non-union membership? A. Absolutely, entirely. Our obligation is completely to the sound administration of the trust. That is primary and basic to operate it in conformity with the National Labor Relations professed in the trust agreement, the National Labor Relations Act of '47, is our first and primary obligation, to administer the trust soundly in the long-range interest to all beneficiaries who are eligible for benefits.

Q. Has that been true regardless of any effort that may have been made to exercise political influence from the outside? A. Nobody has ever tried that on me. I can't speak for anyone else, but I would doubt it very much. One thing you do not mess with.

Q. Has any operator, to your knowledge, attempted to influence you in — or the trustees — in the allowance
2337 or the disallowance of benefits? A. No, sir, not to influence us. Of course, they give information upon our request.

Q. Yes. A. And the same thing is true, of course, of letters in relation to your previous question. We get many letters from Congressmen asking for information or transmitting letters to us which come from a constituent, which we always acknowledge saying we are writing them direct, or have written them direct, giving them full information as to their status, but I did not interpret that in line with your question.

Q. No. A: We have many such letters, and of course we have many letters from operators regarding the fact or the evidence that is requested from them, sometimes by the applicant, or sometimes by us direct.

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Q. What, in your opinion, have the trustees attempted to do, has the trustee who was chosen by the operators attempted in the deliberations to reflect the view of the operators, or has he attempted so far as you could tell, to carry out the provisions of the trust agreement with the law? A. He has completely and scrupulously carried out the provisions of the trust agreement and the law
2338 with a definite sense of responsibility and obligation to the trust, as his only — the only thing he is obligated to.

Q. And what about Mr. Lewis as the representative of the union? A. One hundred per cent the same answer, sir. Under no conditions has he deviated in the least degree and has insisted always in conversation to make it perfectly clear that his first responsibility is not to the union but to the trust, in administering the trust. I have heard him say it repeatedly many times in my presence, and he has so acted.

2339

CROSS EXAMINATION

By Mr. Robertson:

Q. Miss Roche, I wonder if you could tell us what the most distressing welfare problem facing the coal miner is today? A. Work.

Q. Beg your pardon? A. Work, employment.

Q. The lack of work? A. The employment problem, I would say, sir.

Q. What has the Welfare Fund done in this field? A. I think the Welfare Fund, to the extent that it is possible under the trust agreement and the trustee regulations has done a great deal.

Necessarily an unemployment situation such as today which cuts across the entire economy and hits industry, basic and service and everything else, could not possibly be handled by the trust fund. But by and large,
2340 if the production situation had not been brought

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down to the extent it has of today, by competitive fuels, by imports, residual oil, and other factors of that sort, to a very great extent, the entire pension program, as you will have noted, no doubt, sir, in reading the regulations, does a great deal to take care of men who are reaching mature age or even old age, although to me sixty doesn't seem too old.

But, anyway, as you notice, sir, one of the regulations is keyed particularly to the mining situation in that you have your thirty years in which to accumulate your twenty years. You could, as one of these applications which I think was called to your attention indicates, you can accumulate at a period considerably before you reach your age of sixty, if you are let out of the mines, and then when you become sixty and meet the age qualifications, you get your pension.

Furthermore, sir, of course, it has been of tremendous help — at least I will withdraw the adjective "tremendous, I would say a very great help — that the fund has rendered through its hospital and medical care benefits in restoring so many of the disabled men and in continuing the benefits which are unparalleled both in their liberality as to service and eligibility requirements, continuing them now for twelve months after a man has lost his — has left his last 2341 occupation.

I think, as you will note of course in reading the trust agreement, there there is, within the terms of that agreement, very wide latitude for the trustees, if, as, and when it seems to them to have priority status, to do something specifically for unemployment problems. I do not think that it is a matter probably that sometime we will be able to do any more than we are doing.

Q. I believe in your answer, you noted two things, that is pensions and hospitalization. Has the fund done anything else such as help train men for other work? A. No, sir, we have not done training. We have done an extraordinary — in fact the greatest program I think that has ever been done nationally or in foreign countries, because they have come from all over to see the physical and medi-

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cal rehabilitation that Dr. Draper and Dr. Winnebrenner, and these other area medical officers have done in restoring people so that they could be, when the physical and medical program is finished, they are then referred to the vocational and rehabilitation service of the federal and state governments, and a great deal has been done of course with those physically rehabilitated men and women, to train them for other occupations.

Q. And that is under the federal program? A. That is — after the physical is done, that is a function, we have
2342 always paid for that, but we do not pay for vocational training that we refer them — we have a very successful and increasingly successful, I think I could say, relationship, cooperative relationship, with the state agencies on vocational training, although there is a great deal yet to be done there and with us.

Q. Other than these that you have mentioned, has the welfare fund done any other work in this field of unemployment?

Can you hear me?

A. Yes, I can hear you pretty well. If I can't, I will ask you to repeat it.

I would not say so direct, no, sir. I think we have, as much as we could, helped in stimulating other agencies. That of course is also something we do to the best of our ability, to try to point out certain concrete things that other interested agencies which have specialties such as handling unemployment can do. But spending our own money, no, sir, I would not say anything further right now.

2343 Q. I believe on direct examination you stated that the trustees authorized a course of action against all companies who are delinquent in their payments of welfare royalties, regardless of company? A. That is our obligation, of course, yes.

Q. No favor is made in any way? A. No, sir, they are all treated alike. Big or little, or here or there.

• *Testimony of H. G. Schmidt*

Q. And the trustees do not consider — A. That is right.

Q. The ability of the company to pay or anything of that sort? A. If they sign a contract and that is a contract provision, we feel that that should be worked out. Of course, it is true, as counsel no doubt will state in later testimony, that when it can be paid out within a brief period of time, that can be done, but we never make any exceptions to the total amount. If that is what you mean.

Mr. Robertson: That is all.

2344

H. G. SCHMIDT

called as a witness by and on behalf of plaintiff and cross-defendant.

By Mr. Kramer:

Q. Will you give the reporter your name as you usually sign it, please? A. H. G. Schmidt.

Q. Mr. Schmidt, how old are you? A. I am 61 years old.

Q. And your place of residence? A. I reside in Cleveland, Ohio.

Q. Were you a native of Cleveland, Ohio? A. I am now a native of Ohio, but I was born near Junction City, Kansas.

Q. What is your educational background, please? A. I was born on a farm near Junction City, Kansas. I attended the elementary schools in that little town. I graduated from the high school there and subsequently attended the University of Kansas at Lawrence, Kansas, and later I also at a later date, several years later, I attended the Massachusetts Institute of Technology. I worked on my

2345 master's degree at that time.

Q. What field did you take your degree in, or what was your field of study when you were at the University of Kansas? A. I studied mechanical engineering and received a degree in mechanical engineering, bachelor of science in mechanical engineering.

Testimony of H. G. Schmidt

Q. Were you raised on a farm? You spoke about a farm.

A. Yes.

Q. After receiving your degree in mechanical engineering at the University of Kansas, what was the first work you did? A. The first assignment I had was as a reserve officer at Fort Des Moines, Iowa, for just a few weeks, if that is considered work. I later went to Boston, Massachusetts, where I obtained a job with great difficulty at that time as a molder's helper in the foundry of the Blake & Knowles Works of the Worthington Pump and Machinery Corporation as it was known then. It is now known as the Worthington Corporation.

Q. What was the nature of the work you did briefly while there as a molder's helper? A. Well, it was very hard work. I was assigned as a helper to a Polish man who was the molder. I shoveled sand.

2346 Q. I didn't intend to get into all the details. After shoveling sand there as a molder's helper, about how long did you stay at that job? A. I was there almost a year.

Q. Were jobs scarce and hard to get at that time? A. They certainly were.

Q. Following that work, what did you do? A. Quite by accident I shipped aboard the steamship "Leviathan" and was in the Merchant Marine for some number of months, about a year and eight or nine months.

Q. That was on the steamship "Leviathan?" A. That is correct.

Q. What type of work did you do while you were a hand on that steamship? A. Well, it wasn't a very fancy job to start off with. I was assigned in the lowest classification. It was called a wiper.

Q. Wiper? A. A wiper. We did everything that anyone wanted us to do that they didn't want to do themselves.

Q. On that were you making trips back and forth on that ship? Were you working as a wiper across the Atlantic? A. Yes.

Testimony of H. G. Schmidt

Q. The "Leviathan", as I recall, was a large passenger vessel? A. A very large passenger ship and one of
2347 best known at that time.

Q. That was about when with reference to World War I? A. Well, it was in the year — about the year 1924. It was the old "Vaterland" of the Hamburg-American Line that was interned here at the beginning of World War I, later converted to a troop ship during the war, and subsequent to that was converted to a very fine passenger ship.

Q. How long did you say you stayed on that job on the "Leviathan"? A. That was about a year and eight or nine months.

Q. Then what did you do? A. I went back to Boston and obtained a job as a machinist at the shipbuilding yards of the Bethlehem Shipbuilding Corporation.

Q. You had to have a job there, I take it? A. I certainly did. I didn't have very much money.

2348 Q. During these courtship days and while you took this other job there as a machinist, what line of work in the shipbuilding yard? A. That was the Bethlehem Shipbuilding Corporation. I am very proud to say that I helped in a small way in the construction of the airplane carrier "Lexington", which I think was sunk in the Pacific during the late war. I didn't work there very long. I was fortunate in being able to obtain a job in the testing laboratories of the Edison Electric Illuminating Company of Boston.

Q. Now from that job in the Electric Illuminating Company, what did you do? A. After I had been there a number of months, and after this girlfriend of mine had graduated from Wellesley, I decided I had better go back to school, so I entered the rolls of the Massachusetts Institute of Technology at Cambridge.

2349 Q. Did you stay at MIT, as we generally call it, until you graduated, or what — A. No, I didn't re-

Testimony of H.G. Schmidt

ceive my Masters Degree, much to my regret. Instead I received a job with the Goodyear Tire and Rubber Company.

Q. The nature of that job and how long you followed it, please, what happened then? A. At Goodyear?

Q. Yes. A. Yes. Well, I stayed there for a long time. I was with Goodyear for fifteen years.

Q. Where did you start with Goodyear, and what type of job when you left there? A. I started in as a steam engineer, and rose very rapidly with that company — with that great company, I might add — to the position of manager of the engineering staff, and in that responsibility, I was in charge of design and construction of plants for Goodyear all over the world, and also more or less as a side issue, I was general manager of the Wheeling Township Coal Mining Company, a wholly-owned subsidiary of Goodyear. That was how I got into coal.

Q. That was your first connection with coal? A. Yes, sir.

Q. Now what type of mining operation did the Goodyear have through this subsidiary corporation? A. This 2350 mine was purchased during World War I as a source of fuel for their own power plants. The company had signed what I considered to be a very unfavorable lease, and when I took charge, it seemed very clear to me that we would have to develop outside sales to make the operation a successful one, and this I did.

Q. You mean sales of coal other than what you used in your own company? A. To others, to consumers other than Goodyear, and that mine, when I left, was producing about a million, two hundred thousand tons of coal from the Pittsburgh Number Eight seam.

Q. Where were the mines of this subsidiary of Goodyear located? A. This mine was very close to Cadiz, Ohio.

Q. How close were you associated, now, in the operation of that mine? A. I was general manager of that mine.

Testimony of H. G. Schmidt

I took a great interest in it. I developed it from a small mine of about three hundred thousand tons of coal a year to a million two hundred thousand tons a year.

Q. What type of mine was it with reference to its operation, mechanized mine or otherwise? A. Yes, it was a mechanized mine. It had just been mechanized partially when I took over in about 1932.

2351 Q. Do you know about how many men you had employed? A. I would recall at this late date about two or three hundred men, four hundred men, maybe.

Q. When did you leave the Goodyear Tire and Rubber Company? A. I left the Goodyear Tire and Rubber Company at the end of June, 1942.

Q. And then with whom did you go and what line of work did you enter into? A. I was asked by the directors of the North American Coal Corporation to assume the full responsibility of that company in Cleveland.

Q. Is Cleveland, Ohio, and was it at that time the headquarters of the North American Coal Corporation? A. Yes, it was at that time, and it is now, is today.

Q. What size organization was the North American Coal Corporation? A. Well, at that time, it was rather small, it was about the 34th in size in the United States, mining about two million tons, maybe a little more, maybe a little less.

Q. Annually? A. Annually, that's right.

2352 Q. Did you carry the responsibility as the chief executive officer of that corporation from the time you went with it? A. Yes, I was elected the chief executive officer on July 1st, 1942, and I have continued in that capacity to this date.

Q. Where does North American Coal Corporation have its coal operations? A. I believe the figures will disclose that at the present time and for the year just ended we are the 8th largest commercial coal producer in the United States.

Testimony of H. G. Schmidt

Q. Where are your mines? A. Our mines are located in Ohio, West Virginia, Pennsylvania, and a lignite mine, a small lignite mine, in North Dakota.

Q. Are your mines mechanized? A. They are fully and completely mechanized, yes, sir.

Q. Does the North American Coal Corporation have a collective bargaining agreement, or is it a party to the 1950 collective bargaining agreement with the United Mine Workers of America? A. They do.

Q. Did you personally participate in the negotiations for this company, this corporation, with the United Mine Workers of the collective bargaining agreements? A. Only
2353 intimately in the negotiations that took place a year or two ago. I was informed as to the trend of negotiations that took place, but at no time had I taken an active part until the last period of negotiations.

Q. Someone else was doing the negotiating for your company before that time? A. Yes.

Q. I believe you are now one of the trustees of the United Mine Workers of America Welfare and Retirement Fund, are you not? A. Yes.

Q. When did you become one of the three trustees of that fund? A. If my memory serves me correctly, it was on or about May 9, 1958.

Q. Then you succeeded Mr. John Owen after his death? A. Yes.

Q. I mean Charles Owen. A. Charles Owen, yes, that's right.

Q. After his death? A. That's right.

Q. In what way were you selected as a trustee of this fund? A. It was one of those unusual circumstances.
Charles Owen has passed on; the office of trustee
2354 appointed by the operators was vacant. I had expressed considerable dissatisfaction with the \$35,000 a year that this man had received from the fund. I thought it was wrong, and when this matter was discussed in a

Testimony of H. G. Schmidt

meeting of the Bituminous Coal Operators Association, I voiced my feeling as I had on prior occasions, and as usual in circumstances of that nature, I was appointed on the committee to find a person who would serve adequately and properly.

We had great difficulty finding anyone that was satisfactory to the industry. We had meetings with the Southern Coal Producers Association. I remember a meeting with Mr. Moody, and there may have been others from that group, but I don't remember their names.

It seemed as if there was no one who was qualified. We thought we had an ex-vice-president, a retired vice-president at Consolidation Coal that everyone seemed to agree to, but when he was opportuned, he turned it down.

Later at a meeting in Washington with the Southern Coal Producers Association, Mr. Moody turned around to me and said, "Well, why don't you take the job?"

I was quite surprised that he would even suggest it. He made the statement that he thought the entire industry would approve of my appointment. I told him I didn't think I would have the time for it, but on the way back to

Cleveland in the plane, I decided that if there were
-2354a no objections from any substantial operators, or substantial group of operators, or important tonnages, that I would accept.

So I called Mr. Moody and told him of his con-
2355 versation and his remark, and it was a rather casual remark, I thought. And I said to him that if he would sponsor my nomination and there was no important tonnage that objected to me as an individual, and if the operators would pay the cost of my lawyer's services, I would take the job entirely without pay or remuneration of any kind.

I said, "Now, Mr. Moody, I will leave this with you and I will do nothing about it."

Testimony of H. G. Schmidt

I had heard it took some little time to obtain the consent of the various operating groups and the various companies.

At a later date I was officially notified by, I believe it was from Miss Roche. It may have been from Mr. Mitch. I am not certain and it doesn't really matter—that I had been accredited and accepted and there would be a meeting on about May 9th, 1958, and I attended it as trustee at that time.

Q. As I recall the collective bargaining agreement which provides the method of selecting trustees, it provides that the trustee to be chosen of this fund by the operators shall be chosen by operators representing 51 per cent of the tonnage produced. A. Yes, sir.

Q. And you were, so I understood, had been so
2356 selected? A. I understand that is the case; yes, sir.

Q. Since then, which was in the early spring of 1958, you have been serving as a trustee of the Fund? A. Yes, sir.

Q. You mentioned a moment ago salary. Do you receive from the Fund any salary at all for your services as a trustee? A. I receive no salary from the fund and have not from the beginning, and I will not at any time in the future either directly, indirectly, remotely or contingently.

Q. The only compensation is refund of expenses you may have through your attorneys, your personal attorney in the fund? A. Yes, sir, and the operators pay for those services.

Q. Now did you at the time of your appointment, or have you since, had complaint from any of the operators with reference to your appointment or your services? A. I had none.

Q. How frequently have these trustees met, or do they meet, since your appointment? A. We meet every two or three months.

Q. Meetings are in the offices at Washington, D. C.?

Testimony of H. G. Schmidt

A. Always in the offices of the Welfare Fund in
2357 Washington.

Q. You think, as near as you can now recall, that you have attended all the meetings of the Fund since you have been a trustee? A. I have attended all of the meetings since I have been a trustee.

Q. What is the duration—I mean the period of time, length in hours or whatever it may have been—that a meeting ordinarily lasts? A. I don't believe we have ever finished a meeting in less than two hours, and it is my recollection that two or three have lasted almost four hours.

Q. Tell the jury and his Honor, in a general way, the method of conducting those meetings and what business you transact at them. A. In my judgment those meetings are transacted in a very business-like way. The minutes of the last meeting are read; if there are any corrections they are made, or any supplements to the minutes they are made. We then receive reports from counsel, Mr. Mitch.

Q. Mr. Val J. Mitch? A. Mr. Val Mitch, and this usually takes a great deal of time.

Q. We will stop long enough at that point to explain the reports. What is the nature of the reports that the
2358 counsel to the Fund make to the trustees at these meetings? A. Well, those reports are indeed voluminous. They cover a report of settlements that have been made, and decisions that have been made in the various courts—mostly in the District of Columbia.

They comprise new lawsuits that the Fund institutes against many defendants. Almost all of those are in the nature of lawsuits initiated to collect royalty payments that are in arrears.

They also include such lawsuits that are instituted against the Fund. They also will include any formal transactions, such as the transfer of real estate and other legal matters that may, or that need the attention of the trustees and need the action of the trustees.

Testimony of H. G. Schmidt

Q. Are all actions that have been brought by the trustees in the interim between this meeting and the previous one wherein the trustees are seeking to collect delinquent royalties, reported to you people, the trustees? A. They are all reported. They are reported at every meeting.

Q. Then from meeting to meeting as progress takes place in those respective suits, is that reported to you people?

A. That is also reported. We ask many questions 2359 - and Mr. Mitch always had the answers. He is fully informed as to the status of the lawsuits, and also he will express an opinion as to when they might be terminated.

Mr. Kramer: That is a hazardous opinion in many lawsuits when they will terminate.

By Mr. Kramer:

Q. But he makes a detailed report with reference to all this litigation? A. He does indeed.

Q. What action, if any, do the trustees take with reference to the report made by the counsel? A. At the end of the discussion, or rather at the end of the report of Mr. Mitch and at the end of the discussion too, there is almost always a long discussion in connection with these lawsuits that are approved by the trustees.

Q. Do the trustees give any instructions to the counsel that certain operators are to be sued and others not to be sued and exercise that kind of control by the trustees?

A. Not in the form that he is ordered to take a specific action. He recommends the action. We review it and we, to my knowledge, have always accepted his recommendation and have approved his views.

Q. Is there any policy on the part of the trustees 2360 of singling out or sorting out certain operators and bringing suit against them rather than others? A. Never.

Q. Has there ever been on the part of the trustees since you have been a member of this board of trustees, any efforts to sue punitively against some operator? A. Never.

Testimony of H. G. Schmidt

Q. What does, as far as you know, guide the decision that Mr. Mitch makes and as approved by you people as to who shall be sued? A. I have learned to know Mr. Mitch after three years of association with him, as I have my fellow trustees, and also Mr. Ryan, and I am impressed with his ability, his sincerity and his impartiality, and I feel that he is honest, capable, thoroughly reliable man of high character, and I don't doubt in the slightest that he is making his recommendations, and has made his recommendations, on the basis of complete impartiality.

Q. Has your board of trustees, you individually or the board as a group, since you have been a member thereof, ever taken any action to instruct counsel or his staff to sue any particular operator or operators for the purpose of embarrassing or putting out of business that operator?

A. Never.

2361 Q. Has any such type of function or operation ever been discussed that you know of? A. Never.

Q. Has the bringing of lawsuits, so far as you know, ever been used as a method for forcing out of business any particular operator or group of operators? A. I do not believe that has been done. I am convinced it has not been done.

I might add, that I have interrogated not only Mr. Mitch but Miss Roche at length in regard to that because it has many times come to my attention from other operators that deals have been made, and I have asked them in all of those situations to produce the facts, that I was very much interested and if they would produce the facts and bring them to the attention of Miss Roche that they would be properly investigated and a report made.

It might be interesting to these proceedings to know that not one of these alleged claims that deals are made has ever been made to Miss Roche. They have never followed up on my suggestion. So I have discounted the statements completely.

Testimony of H. G. Schmidt

Q. No facts or information has ever been submitted to you indicating the truth of any statement of that sort?

A. Not one single fact.

2362 Q. That applies to this entire period of some three years you have been a trustee? A. In my entire period as a trustee.

Q. There has been something said in this record with reference to pensioners, that is, retired miners who draw pensions, serving on picket lines where there is an organizational campaign going on by the United Mine Workers of America.

Has any effort been made so far as you were aware during the period of time you have been a trustee of the fund, to command or dictate to pensioners that they must go on the picket line? A. There has never been a discussion of that nature at our meetings in Washington, and no action has ever been taken officially or unofficially in that connection. It just has never been discussed.

Q. So far as you are aware has that even been discussed or has any informal action or word gone out from the trustees? A. No. I am convinced that no such action was taken by any trustee in that connection.

Q. Do you personally know of how many instances benefits, pensions and so on, have been paid, during your period, to retired miners who were not members of the United Mine Workers of America? A. I have no
2363 information as to the number; no.

Q. Do you know that the Fund though has a policy that membership is not necessary for the payment of benefits? A. That is the policy of the Fund as clearly stated in the resolutions.

Q. So far as you know has that policy, during the period of time that you have been a trustee, been thoroughly carried out? A. It has been carried out to the best of my knowledge and right out all through the administration of the fund.

Testimony of H. G. Schmidt

Q. In your service as a trustee of this Welfare & Retirement Fund, do you consider yourself as a spokesman for the operators? A. No, I do not.

Q. Will you explain in what capacity you attempt to, or not only attempt to but do, serve as such trustee? A. I serve as a trustee solely in the capacity of an individual responsible only to my own conscience and to the principles and objectives of the fund.

I feel that it carries with it a tremendous responsibility. I take it most seriously and I do not feel I am responsible to any one, not even to Miss Roche, Mr. Lewis, the operators, to the mine workers, or to the public. I
2364 am responsible only to the Fund.

Q. And is that the attitude you have assumed in the administration of the fund since you have been a member of the board of trustees? A. That is exactly the policy I have pursued and I have made it clear time after time to my fellow operators and to others who have either in detail or casually made inquiries as to my position and my stewardship as a trustee.

2365 Q. Do you feel that Mr. Lewis, while he was president of the United Mine Workers of America or since he has become president emeritus thereof and is still chairman of the trustees of this Welfare and Retirement Fund, has dominated the handling of that fund, or in what way do you think it has been handled, benefits paid, policies followed? A. I do not believe that Mr. Lewis has dominated the fund at all. He has been influential.

Q. Are the various matters that come up before the trustees discussed at length by all members of the trust and they express their opinions thereon? A. They are most surely discussed at great length. Because Miss Roche is the administrator, she in every instance that I recall has presented the problems involved over all general policy and has made her recommendations along the lines that she feels is proper.

Testimony of H. G. Schmidt

I would say that if you wanted to put this on a percentage basis, and I presume this is one of the prerogatives of women, that Miss Roche takes up most of the time in talking about the fund affairs, and I come next, and Mr. Lewis is a very poor third. He listens most of the time.

Q. In other words, Miss Roche is a rather free speaker, is she not? A. Yes. She is in my judgment a very capable, able person.

2366 Q. Going back to the beneficiaries of the fund who may be beneficiaries of some of the benefits, pensions of one type or other benefits, I believe it is provision of the regulations of the fund, as well as the Taft-Hartley Law itself, that only those people who at the time they severed their connection with the fund were employed by a signatory of the contract can receive benefits from the fund. Have you tried to follow that out accurately? A. Mr. Kramer, would you mind repeating that? I didn't get quite the first part.

Q. That beneficiaries of the fund must be or have been employees of the signatories of the contract. A. Right.

Q. Has that policy been followed? A. Oh, definitely.

Mr. Kramer: That is all.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Schmidt, you were appointed as trustee of the fund May 9, 1958? A. Yes.

Q. And that was after this lawsuit was filed, is that right? A. I don't know.

2367 Q. You appear to have—A. Pardon me, sir, I am just a little bit hard of hearing. Would you speak up, please?

Q. I am sorry. You appear to have a predilection to taking pay from the trust fund? A. Yes, sir.

Q. Do you have some reasons for that? A. Yes, indeed.

Testimony of H. G. Schmidt

Q. What are those reasons? A. In my judgment the trustee appointed by the operators should be an operator himself. I believe that he should be active in the coal business. He should have some experience in dealing with these social problems and labor problems. The man undoubtedly has an income of his own. This is a charitable trust. It never made sense to me that the operator-appointed trustee should receive \$35,000 a year for attending a few meetings. The amount seemed very large and out of proportion to the whole character of the set-up.

Of course, the man that serves has tremendous liabilities, possible liabilities. He is exposed to many lawsuits and many charges of all kinds. And yet with all of that, it seemed to me that a person appointed by the operators, if he was to receive any pay at all, was to receive it from the operators themselves, not from the fund.

The fund is a charitable trust and is set up and 2368 organized for the sole and exclusive purpose of providing welfare services, health and medical services to coal miners; signatory to the operators, and to provide pensions, and also to help the survivors of mine disasters.

It seemed to me that the operator-appointed trustee should be willing to serve without pay.

In my own case, I am adequately remunerated by my own company. I also have substantial income otherwise. In the first place, I feel I owe it to the industry, I owe it to the coal miners, I owe it to society to give some of my time to this great effort. And it was for that reason and for those reasons that I agreed to serve as a trustee.

Q. Now, Mr. Schmidt, I remind you that you were added as a party to this case because your appointment did occur after the case was filed, your addition to the case being on or about May 29, 1958, as a party to the case. Now your predecessor was Mr. Charles Owen, is that correct? A. Yes.

Testimony of H. G. Schmidt

Q. And Mr. Owen did receive pay from the trust fund?
A. Yes.

Q. And Mr. Owen was appointed in the contract of 1950?
A. I don't know that to be a fact.

Q. You do not know whether or not he was named
2369 in the National Bituminous Coal Wage Agreement
of 1950? A. I don't remember the exact date. He
was a trustee for quite a number of years.

Q. He was your immediate predecessor? A. Yes.

Q. Now Mr. Owen, I believe, died July 20, 1957? A. About
that time. I could not certify as to the exact date.

Q. And you were appointed May 9, 1958? A. Yes.

Q. Approximately nine to ten months after? A. Yes.

Q. After Mr. Owen died? A. Yes.

Q. Did the operators have a trustee on the Welfare Fund
in that interval of time? A. No.

Q. Did the trust fund continue to operate in that interval
of time? A. Yes.

Q. And could you estimate the amount of money the
trust fund received and paid out during that interval of
nine or ten months? A. Without quibbling as to exact
figures, it must have been in the proximity of 90 million
dollars of receipts and about 90 million dollars of
2370 expenditures in nine months. It is about 10 million
or maybe a little more. Sometimes it has been as
much as 11 or 12. Say from 90 to 100 million dollars.

Q. Did you accept the practices and procedures which
you found in the trustees fund when you came into office?
A. I did.

Q. There has been no change since you took the office?
A. Yes, there have been many changes. Yes, quite a num-
ber of changes in the benefits paid to miners and the amount
of money paid to pensioners.

Q. I believe one such change was reduction in the pen-
sions? A. There was also reduction in medical pay and

Testimony of H. G. Schmidt

in the rules and regulations pertaining to the qualifications of those receiving medical benefits.

Q. And also was there not a change which eliminated those miners who were connected with the management of a mine from receiving a period of eligibility for pensions while they were connected with management? A. I believe that was discussed. My memory is a little hazy about that, but yes.

Q. Was not the purpose of that to eliminate from
2371 eligibility these small mines, the miners in these small mines who would get together and form a company and open up a small mine? A. No, I don't think the purpose of that was to eliminate anyone that had a right to any benefits from the fund, none whatsoever.

Q. But it would eliminate them from benefits? A. I am not certain that is correct. I would have to examine that carefully to say that.

Q. That was a very important resolution, was it not, Mr. Schmidt? A. They are all important, sir.

Q. Yes, sir. And there are hundreds and thousands of these small mines across the country where unemployed miners have gotten together and formed little companies? A. Yes.

Q. And they are each part of the management because it is a partnership and they go into the ground and open up small mines. Now this resolution would eliminate all those people from eligibility? A. I don't believe that I can answer you on that question. I just at the moment can't say. I don't know. I would like to, if I may, make a comment as to the number of small mines. I don't believe that it is in the thousands. It is in the hundreds.

2372 I think there are a total, according to last count, about 3,000 financial entities in the coal industry.

Q. We have quite a few of those little mines here in Tennessee? A. I have heard that you do.

Q. Yes, sir.

Testimony of H. G. Schmidt

Q. Now is it true, then, Mr. Schmidt, that the bulk of the period of your meetings as trustees is taken up with discussion of lawsuits? A. Discussion of what?

Q. Of lawsuits. A. Lawsuits, part of the time. Sometimes it may be as much as 50 per cent of the time; sometimes it is as little as 15 or 20 per cent.

Q. I believe you said a while ago that lawsuits did take up a good part of your meetings? A. I think 50 per cent of the time is a large part of the time. Now as percentage, I don't know the exact per cent, but it is a large part of the time.

Q. And the fund has a policy of never settling any of these lawsuits? A. Oh, the fund has been definite in policy and an obligation to settle all of these lawsuits and does.

Q. By collecting the last cent? A. By collecting
2373 as much as they are entitled to.

Q. Which is the last cent under the contract? A.
Correct.

Q. That policy is pursued even though the company ends up in receivership or bankruptcy? A. That is correct.

Q. And even though the employees of that company who have mined the coal, that have paid the royalties to the fund before that, are then thrown out of the industry and lose their eligibility under the fund? A. That is correct.

Q. Mr. Schmidt, you mentioned a while ago hear-
2374 ing operators say things about deals having been made. What kind of deals? A. Well, the general statement, most often it was a casual statement, unsupported by facts as I am convinced, but the statement is along this line:

• That the fund does not attempt soon enough to collect the royalties, that they wait until all of the other bills are paid, and they hold up on royalty payments, knowing, so the rumor is and so the statement is, that the fund will make a settlement with them on a reduced basis, and I have repeatedly interrogated Mr. Mitch and Miss Roche

Testimony of Val J. Mitch

as to the practice of the administrator and of the administration of the fund as to that practice, and I am—and I have also interrogated the operators in detail—and I am convinced first that no such practice is indulged in, and secondly, I have yet to receive one shred of evidence from my operator friends that this is a fact.

Q. And it is true that the lawsuits are prosecuted to the ultimate end? A. They are determined to the ultimate end.

Q. Mr. Schmidt, do you have many instances such as is true in this case, where the amount sought to be collected in these lawsuits amounts to more than the profits, the entire profits of the company over its entire 2375 life? A. The profits of the company are never discussed at our trustees meeting, and I have no knowledge of the profits.

Q. Do you have knowledge of the fact that pensioners have been organized into union activities? A. Will you please repeat that question?

Q. Do you have knowledge of the fact that pensioners receiving pensions from the fund have been organized into union activities? A. No, I have no knowledge of that.

Mr. Rowntree: That's all.

RE DIRECT EXAMINATION.

By Mr. Kramer:

Q. One question, Mr. Schmidt, you spoke about the fact you did not receive any salary from the trust. Can you tell us whether Mr. Lewis receives any salary as a trustee, receives any salary from the trust as a trustee? A. Mr. Lewis does not receive a salary from the trust as a trustee.

Q. So neither you or he—you chosen by the operators, he by the union—receive any compensation or salary out of the trust, of the fund? A. Not one single penny.

Testimony of Val J. Mitch

DIRECT EXAMINATION

By Mr. Kramer:

Q. Your name is Val J. Mitch? A. Yes, sir.

Q. Mr. Mitch, how old are you? A. I am fifty-five.

Q. Where do you live? A. In Washington, D. C.

2377 Q. You are a lawyer by profession? A. Yes, sir.

Q. Are you in any wise now connected with the United Mine Workers of America Welfare and Retirement Fund? A. Yes, sir, I am counsel to the trustees of that fund.

Q. How long have you been counsel to the trustees of that fund? A. Since its inception in 1950, on March the 4th, and I was also counsel for a short time of the preceding fund.

Q. The new fund came into existence on March 5, 1950? A. March 5, yes, sir.

Q. March 5, 1950? A. Yes, sir.

Q. Do you have your offices in the same building in which the offices of the fund are located in Washington, D. C. A. I do.

Q. Do you have some associates or assistants to work with or under your direction? A. I have five attorneys, and an auditing section of several employees, plus secretaries.

Q. Plus stenographic help and so on? A. Plus
2378 stenographic help.

Q. Do you give full time to your position there as counsel of the trustees? A. Yes, sir.

Q. And have during all of this period of time? A. I have.

Q. Would you state in just a general way, in not too much detail, what your duties are in this position? A. My duties are to advise the trustees on any and all legal matters affecting the trust; the drafting of resolutions providing for benefit programs to be authorized pursuant to the trust instrument as the trustees may desire; protect

Testimony of Val J. Mitch

the trust against—and the trustees—against all lawsuits which may be brought against them; to file lawsuits against coal operators who are delinquent in their payments to the fund as required in the trust instrument.

Q. Now, in connection with your duties in the drafting of resolutions, what are the type of resolutions that you draw? A. We draw resolutions setting forth the requirements of eligibility of all miners and their dependents who desire to apply for benefits, and that includes the various types of benefits that the trustees desire to put into effect.

Q. You might state, if you will please, the different type of benefits that are in effect and have been in effect during this period of time. A. The trustees have now in effect, pensions, benefits on account of death, hospital and medical care benefits, a distress or disaster benefit.

Q. And you say that you are responsible as counsel for the fund for the drafting of the resolutions under which these payments are made. After you draft resolutions, what is done with the resolutions? A. The resolution becomes a part of the trust records.

Q. Are they submitted to and approved by the trustees? A. Well, that is after they are approved. Yes, they are always approved by the trustees. I only draft them as requested by the trustees. They are presented to the trustees at a duly constituted trustees' meeting. They are again acted upon and either adopted, amended, or whatever desire they have with respect to it. Then after they are adopted, they become a part of the trust records.

Q. Do you have present here today, and as I now hold in my hand, a full and complete copy of the resolutions about which you are testifying? A. Yes, sir.

Mr. Kramer: Your Honor, I do not file these. I make these available to counsel, and if they want them to be filed, we will such resolutions as they may want. I make them available to counsel.

Testimony of Val J. Mitch

By. Mr. Kramer:

Q. Mr. Mitch, do you attend the meetings of the trustees?

A. Yes, sir, I attend all meetings of the trustees.

Q. Has that been true from the inception of this 1951 trust? A. With the exception of one meeting that I missed because I was absent from the city necessarily. Only one meeting have I missed.

Q. Do you recall when it was that you missed attending a particular meeting? A. It was in October of 1950.

Q. And aside from that, you have attended all meetings since you became counsel to the trustees? A. I have, yes, sir.

Q. Are all three trustees present at these meetings? A. All of the trustees are present unless they are ill. That's happened on one or two occasions. And after the death of one of the trustees, and until the successor was appointed, there were only two duly-constituted and effectively operating trustees and they were present at every meeting during that interim.

2381 Q. According to the collective bargaining agreement which contains the trust instrument here, the trustees designated when this trust agreement of 1950 went into effect were Charles Owen, Mr. Lewis, and Miss Roche. Has there been any change, or what changes have there been in those trustees during that period, the entire period of this trust? A. There has been one change. Trustee Owen died in 1957, and he was replaced by Mr. Schmidt, Henry G. Schmidt, who is now trustee.

Q. You mentioned a while ago there was a short period of time, some eight or nine months maybe in there when there wasn't the third trustee, and that was the interim or interval between the death of Mr. Owen and the choice of Mr. Schmidt? A. That is it, yes, sir, that is what I had in mind.

Q. Will you tell us just briefly, we have had some proof on it, your version of how these trustees meetings are conducted? A. They are called by the chairman of the board

Testimony of Val J. Mitch

of trustees. I happened to be designated as secretary to the board of trustees, and I keep the minutes, and the records of the trust. The meeting is called to order, the chairman calls for the reading of the minutes of the
2382 preceding meeting, so they can be examined by the trustees, and changed or ratified. Thereafter he calls for any business which may come before the trust, and then that business is presented to the trustees and disposed of. The trustees adjourn.

Q. What is the usual length of a meeting of each meeting of the board? A. Three to four hours.

Q. You have testified here, and it is uncontradicted, that these meetings run five or six a year. Is that about your recollection? A. About that, yes.

Q. And they are all held in the offices of the trustees there in Washington? A. All except two meetings were held in Florida when Mr. Owen was ill.

2383 Q. And where were they held? A. They were held at St. Augustine and Miami.

Q. Were members, all members of the board there? A. They were all present; yes, sir.

Q. Because of Mr. Owens' illness he was unable to come to Washington? A. That is right.

Q. Mr. Mitch, what, if any, reports do you make at these meetings of the board? A. Well, I report on any matters which are requested by the trustees. Such as the drafting of resolutions or the rendering of any opinion only as requested. But I submit all regular routine. I report on litigation, the status of litigation against the trustees and litigation in which the trustees are parties plaintiff.

Q. What type of litigation do you have, or have you had over this period of time, in which the trustees were parties-plaintiff? A. In which they are parties-plaintiff?

Q. Yes. A. Those are suits to collect the delinquent royalties which are unpaid by operators signatory to the contract.

Testimony of Val J. Mitch

Q. Will you explain how it is determined and by whom it is determined when suits shall be instituted to
2384 recover delinquent payments by signatories to the contract? A. I submit to a routine adopted by the trustees. The comptroller, after he determines that a company is delinquent over a few months, and after he has communicated with the operator reminding him of that fact and seeking payment, on failure to receive the proper payment the account of those operators are referred to the legal department, to me, and I assign them to one of the attorneys on my staff to make an examination of the account, to gather all of the facts and circumstances, and to communicate with the operator concerned to seek payment.

Upon failure after all possibilities of recovery in that manner are exhausted, lawsuits are filed upon receiving a recommendation from that counsel on my staff that he can go no further. And at the next trustees meeting I report that fact.

Q. Who makes the final determination of whether or not a suit shall be filed against the particular delinquent operator? A. I make that decision.

Q. As a signatory to the contract and after you get this report from your staff, you make a decision? A. I make the decision on prior authority from the trustees.

2385 Q. But before instituting suit against a particular operator, A, B, C, or D, who is a signatory to the contract, do you get specific instructions from the trustees as to that particular suit or are you acting under general instructions? A. I act on general instructions. I get no instructions from the trustees as to any individual specific operator.

Q. In what area do you direct these suits to be filed? In any particular state, or how do you select where the suit is supposed to be filed? A. Wherever the coal operator may be or wherever the coal operator's office may

Testimony of Val J. Mitch

be, whichever is desirable. Whatever state that is in, may be in, that is where we file the lawsuit.

Q. Do you make any distinction between the type of the operator, that you might say large or small, if those words have a meaning, or do you take all operators who become delinquent and cannot work out a settlement? A. We make no distinction whatever. They are all signatories to the contract and the trustees have the fiduciary obligation to collect these trust monies which belong to them and that is the way we approach it.

Q. Do you make any discrimination as to the area where you will start the suits? A. I make none.

2386 Q. After these suits are instituted you say you do report to the next meeting of the board of trustees, to the trustees themselves? A. I do; yes, sir.

Q. In detail? A. In detail.

Q. Explain, please. A. I give the name of the company, the address, the amount that we have estimated to be owing the trustee fund, the number of months that the company has been delinquent, and recital of the efforts made by the legal department to have that operator pay without the resort to litigation.

Q. Mr. Mitch, after having instituted these suits for amounts that according to the best information you have is the amount owing, do you find errors in the amount sued for time and time? A. Yes, sir.

Q. And how and what do you do? A. We do find errors.

Q. Explain, please. A. The operators frequently do not report to the trust fund as required by the contract and in the trust instrument as they are required to as to what their tonnage may be. We are then put to the task of as-
2387 certaining from any official source available to us what that tonnage may be and what that debt may be.

Many times we find that after we file these lawsuits based on the best possible information we can obtain, that it is not correct and it is only after we proceed through the lawsuit that we ascertain the true amount owing by that operator.

Testimony of Val J. Mitch

Q. When you do ascertain the true amount, do you proceed in the suit for the amount so ascertained? A. We do; yes, sir.

Q. What about settlement of these cases after they have been instituted? A. There is no settlements made.

Q. Suppose that the operator against whom you brought suit is a signatory to the contract offers to pay it, would you accept the payment after suit is started? A. If he would offer to pay the full amount, we would; yes, sir, absolutely.

Q. Is time given on occasion, extended time for catching up these delinquent payments or making payments? A. If the operator will agree to pay the full amount found to be due and owing, the trust fund after we are satisfied that that is the true amount, we will enter into agreements providing for a time payment, but it must recognize that
2388 the operator must pay the full amount to the trust fund.

Q. Do you give any discount or reduction or do you feel as trustees it is your duty to collect the entire amount due under the contract terms? A. It is the duty of the trustees to collect the entire amount, and we make no discounts, no reductions. We have never done it.

Q. Do you make sometimes a concession of interest when they make a settlement? A. If an operator will agree on this method of paying out over a period of time without resort to litigation and will recognize the full amount of the debt after it is verified, we will not charge him interest unless he defaults on the agreement, in which case the interest is assessed.

Q. If he made an agreement to pay it over a period of months or years you will waive the interest providing he meets those installments? A. If he meets the installments regularly interest is waived during that period. If he defaults interest is assessed.

Q. But in the settlement you make with him does it always cover the full amount that is owing for royalties? A.

Testimony of Val J. Mitch

Always the full amount; yes, sir.

2389 Q. Have you ever in your experience in handling these delinquent accounts used the lawsuit method for the purpose of driving some person or operator who was signatory to the contract out of business? A. We have never had that in mind. We only have in mind our obligation as trustees that we must seek out this money which is rightfully — which rightfully belongs to the trustees under the trust instrument under which they must operate.

Q. That has been the policy? A. That is the policy.

Q. And the policy in all instances? A. In all instances.

Q. Mr. Mitch, in this record something is said about union membership or membership of a claimant or an applicant for pension benefits or for other benefits must be a member of the union in order to receive such benefits.

Will you tell me the policy that is followed by the trustees and yourself as the legal officer. A. The trustees will follow a policy that any employee of an operator signatory to the agreement who is qualified under trustee regulations is eligible for trust fund benefits. Union membership has nothing to do with it.

Q. So far as you know has that procedure been followed without variation during the entire life of this trust fund of 1950? A. To my knowledge it has been.

Q. Do you know of any deviation at all from that?

A. I know of none.

Q. Mr. Mitch, do you have here a list of the requirements for eligibility for benefits of the United Mine Workers of America Welfare & Retirement Fund as such requirements were in effect during the period of this fund since 1950 to January, 1958, the period covered by this litigation? A. These are the major requirements for eligibility; yes, sir.

Mr. Kramer: I want to file this as Exhibit No. 144.

(Exhibit No. 144 was marked for identification and filed.)

By Mr. Kramer:

Q. Will you read off these requirements? A. For pen-

Testimony of Val J. Mitch

sion a miner must have attained the age of 60 years or over at the time of the application for pension.

He must have completed 20 years' service in the coal industry in a job classified in any National Bituminous Coal Wage Agreement within the 30-year period immediately preceding application for pension.

2391 He must have retired from or ceased work in the bituminous coal industry after May 28, 1946, following regular employment in a classified job and was regularly employed in a classified job in the bituminous coal industry immediately preceding May 29, 1946.

The benefit payable at the time you state is \$100.00 per month to all pensioners whose applications have been approved beginning in the first month after authorization for pension.

As to Hospital and Medical Care: Miners and relatives of miners and widows and relatives of deceased miners, are eligible providing that the miner at the time of the request for the hospital and medical care; or the deceased miner who died after May 28, 1956, at the time of death; were either:

- (a) Working in the coal industry in a classified job;
- (b) Receiving retirement pension from the Fund and not employed outside the coal industry;
- (c) Unemployed and whose last employment was in the coal industry in a classified job subsequent to May 28, 1946.

The funeral expense benefit is payable not to exceed \$350.00. Widows and survivors benefit of \$650.00 payable in 12 monthly installments, the first eleven of which
2392 shall be \$50.00 each and the last shall be \$100.00.

Disaster benefits. This benefit provides for the payment of benefits in the case of disaster to miners and to widows and children and other dependent relatives of deceased miners at the discretion of the Director, not to exceed \$500.00 for each person, and providing that not more than \$2,000.00 shall be paid to any one family as a disaster

Testimony of Val J. Mitch

benefit, providing the miner or the deceased miner was at the time of the disaster either:

- (a) Working in the coal industry in a classified job;
- (b) Receiving retirement pension from the Fund and not employed outside the coal industry;
- (c) Unemployed and whose last employment was in the coal industry in a classified job subsequent to May 28, 1946.

Q. Mr. Mitch, you have referred in these requirements of specifications for benefits a time or two to the word "classified job". Will you explain to us so we understand what this is? A. That means an individual who is covered by the contract, the union contract, and is eligible for trust fund benefits, also under the Labor Management Relations Act, because he is not exempt. He is not in an exempt category, such as foreman, superintendent, supervisor. It means those miners who are covered by the union contract and not those exempt.

Q. The word "classified job" does not have anything to do with union membership; does it? A. It has nothing to do with it.

Q. I notice no reference at all in these requisites for these benefits to union membership, and is it at any time required for the payment of benefits of any type, pensions or hospitals or disaster or any of the other benefits? A. It is at no time required.

Q. Do you know of cases being handled upon many occasions in which pensions or other benefits were awarded where the applicant was not a member of the United Mine Workers of America? A. I do.

Q. Would you say that is a matter of rather frequent occurrence or what? A. Well, it appears frequently, yes. There are a substantial number in the fund, I would say.

Q. Do you know of personally many of those that are approved and come across your desk and are in your office?

A. They do come across my desk and I find out about them in conferences and in other meetings.

Q. You do approve them if they meet the qualifications that you have specified herein, regardless of whether or not the applicant is a member of the union? A. I do not actually approve them. I am frequently called on for legal advice with respect to them and the administrative staff has always followed my advice to my recollection.

Q. What is your advice where a question of membership or non-membership in the union may be involved with the applicant? A. My advice is that if the particular applicant is an employee of a coal operator signatory to the contract and is not in an exempt classification, that he must be approved for benefits, even though he may not be a member of the union.

Q. And they have been approved and are benefits paid?

A. They have been approved and there have been 2395 benefits paid.

Q. I note that in this list of qualifications or requirements for benefits, especially I refer now to pensions, it says, the part you read to the jury a few moments ago, payment of \$100 per month to all pensioners, and my question was whether these were regulations that were in effect during the period here involved, which is January 1950 through December 1958. Since December 1958 — I will put this in, your Honor, subject to our previous objection — since December 1958 have there been any changes made in the amount of benefits? A. That amount was changed by trustee regulation last July 1.

Q. To what? A. I beg your pardon. It was February 1, 1960 to \$75.

Q. Reduced to \$75 per month? A. Yes.

Q. There may have been another change. Was there another change made since 1958? What about hospital care? A. In July 1 of last year, 1960, the time limit for miners who were unemployed who could qualify for hospital medi-

Testimony of Val J. Mitch

cal care was — the limit reduced to one year after they last worked for a signatory operation.

2396 Q. Did that have anything to do with union membership or non-union membership? A. Nothing whatsoever to do with union membership.

Q. Why were those changes made and the benefits reduced in the pension fund and the cut-off date established on this hospital fund? A. Solely to protect the financial integrity of the fund. It ran solely to the financial condition of the fund. The outgo of the fund was exceeding the income.

Q. The outgo or payments from the fund and the benefits have been exceeding the income, and in order to bring it in line, they were reduced? A. In order to bring it in line, these changes were made.

Q. Mr. Mitch, at any time during the period that you served as trustee, which is the life of this trust, has there been any effort made by any of the trustees that you know of to put into effect a requirement that a person must be a member of the union in order to receive benefits from this fund? A. No effort was ever made. There have been no discussions on it.

Q. Now, Mr. Mitch, something has been said in this record about pensioners being on a picket line when
2397 the United Mine Workers of America may be on an organizing drive somewhere, a mine, and that the pensioners of the Welfare Fund, or those receiving pensions, have been active on the active picket line. Has there ever been any requirement that you know of that they must be on the picket line or required to be on the picket line in order to receive or to continue to receive, if they are pensioners — A. There have been no requirements whatsoever. There has been no discussion of it in my presence.

Q. Ever been any request by the man chosen by the union, Mr. Lewis, that any such rule be put into effect? A. None whatsoever.

Testimony of Val J. Mitch

Q. Has there ever been any rule of that sort? You say there has never been anything done that you know of? A. There has been no rule.

Q. Has anyone ever been penalized that you know of by his pension being reduced, if already on the pension fund? Or other benefits taken away from him or reduced because he did not participate on a picket line where there has been an organizational drive? A. No, sir.

Q. Have pension benefits or other benefits, as far as that is concerned, been denied by the trustees to persons who claimed to be and perhaps submitted proof that they were members of the union? A. There have been many 2398 denied.

Q. The fact that he was a member, the applicant was a member of the union, has not been determinative of whether he could receive those benefits or not? A. No, sir, he just meet the requirements of eligibility established by the trustees.

Q. That brings to mind another thing. Has the United Mine Workers of America Welfare and Retirement Fund or the trustees thereof ever been sued by anyone who claimed that he was a member of the union and seeking to establish a claim for benefits that the trustees had refused? A. We have had several suits where a man had been denied a pension and he alleged in court that he should receive it because he was a member of the union. It has been sustained by the courts that he can't get it because he must meet the requirements of eligibility. Union membership had nothing to do with it.

Q. Even though he was a member of the union, he did not get the benefits? A. That is correct.

Q. Mr. Mitch, during the period that this trust has been functioning and you have been attending its meetings, meetings of the trustees, has the handling of benefits and the payment of them and the establishment of principles for the

Testimony of Val J. Mitch

operation thereof been dominated by the union? A.
2399 No, sir.

Q. By the operators? A. Not by anyone, except the trustees themselves.

Q. Are there frequent discussions and disagreements and then finally work out an agreement? A. Among the trustees?

Q. Yes. A. Over what?

Q. Well, over something that comes up before the board of trustees. A. Sure, there are always discussions and differences among the trustees, but they settle all those in trustee meetings.

Q. But there is no attempt to dominate either by the union or by the operators? A. No. No, sir.

Q. Mr. Mitch, as of the present time — I believe there is no controversy about this, but I will ask it — Mr. Schmidt does not receive a salary for his services as trustee, does he? A. He does not.

Q. Has not at any time since he was appointed? A. No, sir.

Q. Mr. Lewis? A. Mr. Lewis has never received any money at all from the welfare fund.

2400 Q. Is that right when he first became a trustee, when the fund was first activated or set up? A. That is correct.

Q. Mr. Mitch, as I recall it, in 1949 Judge Charles L. Dawson of Louisville, Kentucky attended a session of wherein — I believe it was Senator Bridges and Mr. Lewis were present, and a question was raised about whether or not Judge Dawson was a member of the board of trustees, or one of the three trustees, and whether he was so designated and properly chosen by the operators. Were you present at that session where the three of them met? A. I was present.

Q. You were present? A. I was.

Q. Will you tell us briefly what occurred at that meeting or that session? A. Mr. Dawson came to the meeting after

Testimony of Val J. Mitch

his predecessor, Mr. Van Horne, had resigned and credentials alleged to be sufficient to appoint him were sent to the chairman of the board of trustees, and he appeared to assert his right to be seated as a trustee. This was in the fall of 1949.

Q. That was really before the 1950 trust came into existence, wasn't it? A. That was before the 1950 trust
2401 came into existence.

Q. Go ahead and tell us about it. A. It was under the 1947 trust. Benefit payments had been in suspension a month or two before that and the contract that contained the trust instrument had expired on July 1, 1949. A new contract had not yet been negotiated. Trustee Bridges had taken a different contrary view as to the effect of that contract as related to the trustees than did Judge Dawson. There was some discussion and confusion and controversy over those two opposing views.

Judge Dawson asserted his right to be seated under the contract which had expired. Senator Bridges contended that he had no right to authorize payment of benefits, which was the desire of the trustees prior to that meeting at least, because the contract had expired. He claimed that gave
him no rights.

2402 Q. That was Senator Bridges? A. There being two views opposed to each other, Mr. Lewis contended until that was reconciled and there was unanimity among the trustees, that Mr. Dawson could not be seated.

Q. In other words, it was Senator Bridges' position that the contract had expired and therefore you could not operate under it, and they could not pay benefits. A. That's right.

Q. And then it had expired, and they could not choose a successor to Mr. Van Horne. A. That's it.

Q. Was anything done at that meeting about this agreement as to the contract? A. There was considerable discussion, and I don't remember all of those details, the main thing I remember is the main theme that I have enunciated.

Testimony of Val J. Mitch

There was so much discussion and more or less Mr. Dawson kept bringing up contentions and resolutions and reading statements, and Mr. Lewis would rule him out of order, and unless Trustee Bridges would consent to the payment of benefits — one or the other must give, according to Mr. Lewis' view as chairman of the board.

Q. Did Senator Bridges ever consent that the contract was in effect so you could pay benefits? A. He never
2403 did, no, sir.

Q. Then if the attitude you could not pay benefits, no contract, and no other member could be chosen — A. That's right, no benefits were paid under that fund.

Q. Is that the tone on which that meeting of the group ended? A. That's the tone on which that meeting ended.

Q. Now, when the 1950 agreement came into effect, which was March following this 1959 date, I believe the three trustees, Owen, Lewis, and Miss Roche were named therein.

A. In the 1950 contract?

Q. In the 1950 contract. A. Right.

Q. That was to take effect in March, 1950. A. Yes, they were, yes, sir.

Q. Now, after these three trustees were named in the contract of 1950, was there — well, I believe before that maybe — did Judge Dawson institute a suit against all three of the trustees? A. He instituted a suit against the trustees of the '47 fund.

Q. Against the trustees of the '47 fund. A. To assert his right to be seated.

Q. Do you recall that all three — Mr. Van Horne,
2404 Mr. Lewis, and Miss Roche — were named? A. Mr. Van Horne had retired. I mean he had resigned. I think that Mr. Lewis was named. I cannot recall any others.

Q. You don't recall just who was involved? A. I do not.

Q. What became of that lawsuit? A. That lawsuit was settled. I think it was dismissed after — it was pending

Testimony of Val J. Mitch

when the 1950 contract was negotiated, and —

Q. It never came to trial is what I am getting at. A. Never came to trial.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Mitch, this exhibit 144, does that contain all the requirements with respect to pensions? A. It contains all of the basic requirements.

Q. All of the basic ones? A. Yes, the major requirements.

Q. You mean there are other requirements besides 2405 these? A. Well, there might be minor.

Q. Could there be minor ones such as membership in the union? A. It would not be that, no, sir. That is not—

Q. Mr. Mitch, I believe you testified in this case in Washington, case of Luchetti versus John L. Lewis, et al, trustees, and I believe you stated there as you have here, that you advised the trustees with respect to legal matters, is that right? A. That's right.

Q. And with respect to interpretations? A. Yes, sir.

Q. Of law and contracts? A. Yes, sir.

Q. And is it not true that you stated in that case construing the language of the 1950 contract as it existed in 1955 with respect to the payment of benefits under the welfare fund provisions of that contract —

Q. That you construed the language of the contract to mean this:

“All of the foregoing benefits are to be made available to members of the Mine Workers who are employees of the operators signatory.” Do you recall that testimony? A. I don't recall that in detail. I think I testified somewhere along that line. What I had in mind there was —

Testimony of Val J. Mitch

Q. Go ahead and explain it. A. It is mentioned in the contract that pensions are to be made available to the individual members of the United Mine Workers of America employed by operators signatory to the agreement. They must be employees of employers signatory of the agreement. If they happened to be members of the United Mine Workers of America. That is what I meant.

Q. But you did say, "To members of the mine workers who are employees of the operators signatory." A. With respect that that classification mentioned in the trust agreement, yes. But there is also another classification mentioned in the trust instrument, namely employees of the operators signatory to the contract.

Q. Isn't that the language that you were construing, that identical language, and isn't that the language that was inserted as an amendment to the 1950 contract? A. That language is in the contract, yes.

Q. Yes, sir. The 1950 contract added words to the 1947, provision, do you recall that? A. Yes.

Q. The 1947 provision contained this expression:

"All of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their dependents."

Then in 1950, were not these additional words added?

"And to employees of the operators other than those exempted from this agreement." A. That's correct.

Q. And then — A. But it also says that these benefits must be administered in accordance with the Labor Management Relations Act of 1947, which makes it mandatory to the trustees to extend benefits to employees of signatory operators regardless of whether they are members of the union, and that is what we do.

Q. That's correct. Yes, sir.

Q. But now, in 1955, in construing this language, 2408 was it not your position that this identical language that we are talking about meant, "to members of the

Testimony of Val J. Mitch

mine workers who are employees of the signatory operators. A. That means only members of the United Mine Workers who happen to be employees of operators signatory of the contract can qualify.

Q. Correct. A. What I meant to mean — it didn't go further, because they didn't ask me there. If you want me to, I will explain that.

Q. Well, go ahead.

Mr. Kramer: You have a right to.

The Witness: If they are members of the United Mine Workers of America and work in non-union mines, they cannot qualify.

By Mr. Rowntree:

Q. Now, Mr. Mitch, you are familiar with the resolutions that existed before 1950? A. With the what?

Q. With the resolutions of the trustees that existed before 1950, you are familiar with them? A. I am vaguely familiar with those, but I must say that I am not — my recollection is hazy on that, because while I was counsel to the 1957 trustees, there were no benefits paid.

2409 Q. Well, there were some pensions paid after Mr. Van Horne and Mr. Lewis settled their dispute? A. that was — I was not counsel at that time.

Q. And is it not true that the resolutions before 1950 strictly required union membership? A. I can't answer that. I don't know exactly on that.

Q. Did you examine — A. I beg your pardon?

Q. You were counsel for the trustees before 1950? A. But we paid no benefits and I didn't get into that question.

Q. You never examined the resolutions? A. I examined them, but as I say, my recollection is hazy. I would have to be refreshed to that.

Q. Do you recall, Mr. Mitch, that we asked for these resolutions during the course of this case? A. Yes.

Q. And they were not presented to us? A. You are talking about the 1950 fund?

Q. The 1950 fund.

Testimony of Val J. Mitch

Mr. Kramer: I think that is correct, Your Honor. I presented them today. They asked for them back there, and we had an argument on the question of admissibility, and it wasn't followed through, but we presented them, 2410 and here they are.

By Mr. Rowntree:

Q. And isn't it true, Mr. Mitch, that these resolutions in this book are maintained in secrecy, and they are not published to anyone? A. Well, I wouldn't regard it as that. It is official trust business, and we keep all of our resolutions and the minutes and the business of the trust in the office in Washington, D. C. We don't make them public, no.

Q. You don't show them to anyone, even an applicant for a pension? A. We don't make them public, no. We tell any applicant that writes into the trust fund, is always told what they are, what he must meet by way of eligibility.

Q. Well, I am referring now to Exhibit 138, the file of Mr. Clem Terreo, and referring to a letter of January 6, 1955, in which he states, "I understand that there is a book of regulations on this."

That is with respect to applications for pensions, and the letter in response, January 18, 1959, of Miss Roche, the director, quote, "Copies of fund regulations are not available for public distribution," close quote.

Now, isn't it true that you never show these resolutions with respect to eligibility requirements to anyone interested? A. May I explain my answer on that? 2411

Q. Yes, sir. Have you answer it? A. What is your answer, what is your question?

Q. Isn't it true that you don't show these resolutions to anyone? A. That is true, but we -- by the same token, we give the information which any man must furnish to the fund, and we send him the proper application forms, if he writes in and asks for them, which is what is done in the next letter in that file you are reading from.

Testimony of Val J. Mitch

Q. And are these copies of the application forms that you send to the man, referring to Exhibit 34? A. That isn't what we sent to Clem Terreo.

Q. But it is the kind of form that you would present to a man today? A. If he writes in?

Q. Yes. A. No, sir, not exactly. We would tear off the back here, the certification by the local and the district, if a man wrote in direct, which is what we did with Clem Terreo.

Q. But he would fill out these forms? A. He would have to fill out the front of those forms to give the basic information, that's correct.

Q. And these are the forms, they require an answer
2412 to all questions, and I refer to the statement, quote,

"All questions must be answered. Failure to do so will delay processing," Close quote.

And there it calls for his district number, his local union number, requires certification of membership in good standing of the applicant in the union. A. You must not have understood my last answer, because when I said when a man writes in direct, we tear off the back of that form requiring certification by the local union and the district, and we sent it to the man directly, and he is not required to furnish anything.

2413 Q. Is that with respect to pensions? A. Any benefit.

Q. You saw those yellow sheets which require the entry of the local union number. A. I don't know what yellow sheets you refer to. I don't recall now what we did with this gentleman.

Q. These sheets here (handing to witness). A. Yes. Those are sent to him, but you will notice he doesn't have to fill out any space that requires that he signify the local union number or the district number because if he is not a member it is not necessary, it is not important.

Q. But the form calls for it. A. The form calls for it, yes.

Testimony of Val J. Mitch.

Q. You keep minutes of all the meetings of the trustees, Mr. Mitch? A. Yes, sir.

Q. It is in the record in this case that there were no minutes of this meeting between Mr. Lewis, Senator Bridges and Judge Dawson, either of those two meetings. Why is that so? A. That was not considered a meeting. Mr. Dawson was not seated. There was no business transacted and there were no minutes kept. There were notes kept of that but I would not know where they are today.

2414 Q. Did Mr. Lewis issue a call for a meeting? A. No. Judge Dawson asked for it.

Q. Was the business of the Fund discussed? A. There was no business of the Fund discussed. The only discussion was Judge Dawson's request whether or not he could be seated.

Q. I thought you said a while ago that there was discussion as to the payment of benefits during the interim between the contracts? A. That was in a prior meeting when Mr. Van Horne was still a trustee.

Q. No, we were talking about, I believe — A. That is what I had in mind when I said that.

Q. Are you saying that there was no discussion at these meetings between Judge Dawson, Mr. Lewis and Senator Bridges with respect to the business of the welfare fund? A. There was no business discussed at that meeting except what I have already testified to here today.

Q. Isn't it true that Judge Dawson at that meeting took the position that benefits should be paid just as Mr. Lewis was trying to have done? A. He took many positions. I don't recall him taking that one. I think his main interest was to be seated as a trustee.

2415 Q. Do you recall Mr. Lewis making a statement at that meeting to the effect that he resented the operators putting somebody on the board of trustees who could deal with Mr. Lewis? A. He never made that statement, to the best of my recollection.

Testimony of Val J. Mitch

Q. Do you deny he made that statement? A. I said to the best of my recollection he never made it.

Q. The beneficiaries of the welfare fund, particularly pensioners, are advised that their pensions are not final, that they can be cancelled at any time; is that right? A. All authorizations contain that because if we did not have enough money they would all have to be cancelled.

Q. This statement appears on every pension award: "This pension is subject to suspension at any time by the Trustees, for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees for any matter, cause or thing of which they shall be the sole judges and without assignment of reason therefor."

Is that the rule which applies to every pension award?

2416. A. That is on the form. That is not—I don't know what you mean by the "rule" that is applied. You asked about the form. It is on the form.

Q. And that would be a qualification that attaches to every pension awarded?

Mr. Kramer: Well, your Honor, that is a construction of a written instrument and a question of law. I object to that question. It is on the award.

The Court: I think this counsel can take care of himself, Mr. Kramer.

Mr. Kramer: Well, I think he can too, your Honor, but —

The Court: Your objection is overruled. Counsel is not objecting to this question, and he may object and the Court will pass on it, but he can take care of himself without any trouble.

Mr. Kramer: I think he can but I thought it was a written instrument and the Court must construe it whether it is a lawyer or layman on the stand.

By Mr. Rowntree:

Q. That is a provision in every pension award?

Mr. Kramer: We admit that.

Testimony of Val J. Mitch

A. That is on every form.

Mr. Kramer: We admit that.

2417 Q. Did you testify that there were a few cases filed in Washington by individuals against the Fund seeking benefits because they were union members? A. I did not testify that they were filed solely at Washington, but there are many filed there and have been filed there, and have been dismissed by the courts there. They have also been filed in many other places, including New York State, Pennsylvania, Tennessee. Robert Taylor Hobbs, in the Supreme Court of Tennessee, who was a union member, was denied by the Fund. He went to court.

Q. And there are many — A. It was denied.

Q. — many of those cases, aren't there? A. I beg your pardon?

Q. There are many, many of those cases? A. Of union —

Q. Union members seeking benefits under the Fund? A. That are denied because they do not meet the regulations of the trustees of the Fund. Yes, sir.

Q. And isn't it true that there is a broad understanding in the coal industry among the men that union membership means everything with regard to these benefits under the Fund? A. I don't know of any such understanding anywhere.

2418 Q. But these cases have been brought in great numbers upon that basis. A. On what basis?

Q. Union membership. A. They have been brought on union membership. These are men seeking to assert their right in a court to benefits that have been denied them by the trustees of the Fund because they fail to meet the requirements of eligibility.

Q. And they assert that they are entitled to benefits because they are union members. A. Well, they assert they meet the regulations of the Fund. They happen to be union members who assert they meet the regulations of the Fund

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who were denied by the trustees and they have gone to court and the court has refused the claim.

Q. Now isn't it true, Mr. Mitch, that they are asserting in those pleadings that they are union members and they are entitled to the benefits? A. Well, that is in the assertions.

Q. Well, isn't it repeated over and over again in those cases filed up there and around over the country? A. Well, they assert their right to benefits and many of them assert that they are members, and many of them assert that as an incidental matter. It has been our experience
2419 that they also assert that they have served so many years in the industry and that they are over 60 years of age.

Q. Has anything been done by the trustees to alleviate or take away this notion that union membership is a requirement to these benefits? A. In every annual report for the last several years there are statements to that effect, that union membership is not a requirement. And wherever the trustees are in line of duty called upon to communicate with potential beneficiaries, applicants, that fact is always
stated. Yes. They do what they can to get that across.

2420 Q. Has it ever been published in the United Mine Workers Journal, for instance, or in any other publication that goes to the men in the industry, a broad dissemination of the expressed statement that this requirement of union membership does not exist? A. We don't publish things like that in the newspapers. We do what we can to make it public. We have an official organ of the trust fund, the annual report that the trustees make each year. They try to give as factual account in that report as they can and that is one of them.

Q. And that goes to the operators and to Congress and to the libraries? A. That has wide distribution. That goes to schools. It goes to libraries, operators, educators.

Testimony of Val J. Mitch

Q. But a non-union man in the mines would never see this? A. We give as wide a distribution as we can.

Mr. Rowntree: That is all.

REDIRECT EXAMINATION

By Mr. Kramer:

Q. Now these annual reports, we filed them this morning by somebody else. They are sent to local unions, in addition to other places you mentioned? A. They are sent to all local unions, all districts of the United Mine Workers.

2421 Q. Now in addition to that distribution that you have talked about, I will ask you if that report in full, or practically in full—if not in full, I believe it is in full—isn't published in the United Mine Workers Journal annually? A. It is always published in the United Mine Workers Journal, yes.

Q. So it goes through the Journal, goes to the union, goes out to the public as you have indicated? A. Yes, sir.

Q. And which sets forth the requirements for pensions and other benefits under the fund? A. Yes, sir.

Q. Has any effort been made at any time to conceal, as far as you know, on behalf of the trustees the requirements necessary to obtain benefits? A. There have been no efforts to conceal anything of that character.

Q. By misrepresentation being made that you know of by the trustees? A. No, sir.

Q. When a person has written in for information, as is shown in these files, has there been any effort so far as you know always to give accurate information to the individual inquiry? A. Accurate and complete.

2422 Q. Has there been any differentiation in the way those claims are handled once they reach the trustees or the staff of the trustees, delaying them in time or anything else, or whether they come through the union or come direct by the individual? A. They are processed in routine fashion, and there has been no effort made to delay them in any way,

shape or form. If there is any delay, it is because the man himself hasn't submitted sufficient evidentiary material to support his claim.

Mr. Kramer: That is all.

RECROSS EXAMINATION

By Mr. Rowntree:

Q. I would like to ask one more thing. This Exhibit 34, that is a welfare fund— A. Pardon?

Q. This is a welfare fund form? A. Yes, sir.

Q. And that is the form which contains certification of membership in good standing in the United Mine Workers of America?

Mr. Kramer: I am going to object to that form of question. It is a form that has a place on it for the certification by a union. It has that on it.

2423 Mr. Rowntree: Of membership in good standing?

Mr. Kramer: Yes, it has a place on that, and these others didn't have on there and they were paid benefits.

2424

JOHN L. LEWIS

called as a witness by and on behalf of the cross-defendants.

DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Mr. John L. Lewis, I believe? A. Yes.

Q. May I ask how old you are, Mr. Lewis? A. Born 1880.

Q. You have for quite some years until quite recently been president of the United Mine Workers of America, I believe? A. Yes.

2425 Q. And you are now President Emeritus of that organization. A. Correct; yes, sir.

Q. When did you step out of the presidency and become President Emeritus of that organization? A. January, 1960.

Testimony of John L. Lewis

Q. What was your first connection with the United Mine Workers of America? A. As a member and an officer of local unions; as legislative representative of districts; delegate to conventions; organizational work; statistician for the International Union; manager or business manager of the United Mine Workers Journal which at that time was on a circulation and advertising basis; later vice-president; later acting president; president in 1920 until 1960 inclusive.

Q. Do you recall what year you first joined the United Mine Workers of America and became a member? A. I do not right now, sir, but —

Q. Where were you living at that time; where was your home? A. In Iowa where I was born.

Q. Your resident at the present time is where, Mr. 2426 Lewis? A. Legal residence is Springfield, Illinois. Temporary residence, Alexandria, Virginia.

Q. Where are the present headquarters of the United Mine Workers? A. In Washington, D. C. since about 1935 or '36.

Q. Prior to 1935 or '36 and after you became president in 1920, where were there headquarters? A. Indianapolis, Indiana, established there in the early days of the organization because it was a centrally located place geographically, and remained there until moved to Washington.

Q. In what areas of the United States, principal ones, are the bituminous coal mines of this country located? A. What we call the entire Appalachian area of the industry running from Pennsylvania on the north to the Warrior River field of Alabama, and extending crosswise of the country in a northwesterly direction to the State of Washington and south to the State of New Mexico. A few small lignite deposits in the State of Texas. Still a few small deposits in California, but there are broken strata and pockets of coal and it is greatly bothered with sulphuric acid water and hardly profitable to operate.

In Oregon there is a small deposit at Coos Bay, in that

2427 area, and the Cascade Mountains of Washington and right through toward Seattle there are vast areas of coal which have not been developed to any substantial proportions.

Q. And there are some substantial coal deposits, or fairly substantial, in the bituminous field in Tennessee, eastern and middle Tennessee, and in parts of Kentucky? A. Quite so. In West Virginia and Pennsylvania, and so forth. In this so-called Appalachian area.

Q. Mr. Lewis, I have here a book, copy of which has already been filed in this record, your Honor, as an exhibit from interrogatories, the Constitution of the International Union and United Mine Workers of America, is that correct? A. I verify it.

Mr. Kramer: I desire to read, your Honor, into the record a portion of the constitution. Reading the preamble first.

"There is no truth more obvious than that without coal there could not have been such marvelous social and industrial progress as marks present day civilization.

"Believing that those whose lot it is to toil within the earth's recesses surrounded by peculiar dangers and deprived of sunlight and pure air, producing the commodity which makes possible the world's progress, are entitled to protection and an equitable share of the fruits of their labor, we have formed the United Mine Workers of America for the purpose of establishing, by lawful means, the principles embraced in the body of this Constitution."

And I read Article I and Article II, your Honor, only of the Constitution, not to be unduly lengthy.

"Article I. Name. This organization shall be known as the United Mine Workers of America. It shall be International in scope, and as an organization shall not be committed to or favor any particular religious creed; neither shall affiliation herewith interfere with the religious or political freedom of individual members.

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"Article II. Objects. First. To unite in one organization, regardless of creed, color or nationality, all workers eligible for membership, employed in and around coal mines, coal washeries, coal processing plants, coke ovens, and in such other industries as may be designated and approved by the International Executive Board, on the American continent.

"Second. To increase the wages, and improve the conditions of employment of our members by legislation, 2429 conciliation, joint agreements or strikes.

"Third. To demand that not more than six hours from bank to bank in each twenty-four hours and not more than five days per week shall be worked by members of our organization.

"Fourth: To strive for a minimum wage scale for all members of our union.

"Fifth. To provide for the education of our children by lawfully prohibiting their employment until they have at least reached eighteen years of age.

"Sixth. To secure equitable statutory old-age pensions, workmen's compensation and unemployment insurance laws. To provide for security against old age and disability of members and their dependents.

"Seventh. To enforce existing just laws and to secure the repeal of those which are unjust.

"Eighth. To secure by legislative enactment, laws protecting the limbs, lives and health of our members; establishing our right to organize; prohibiting the use of deception to secure strike breakers; preventing the employment of privately armed guards during labor disputes; and such other legislation as will be beneficial to the members of our craft."

2430 By Mr. Kramer:

Q. Mr. Lewis, you have heard me read the objectives set forth in Article 2 of this constitution. Since you have been president of this organization or while you were

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president of it, did you attempt to carry out those objectives? A. At all times and under all conditions, subject, however, to such modifications as conditions imposed upon the industry and upon the bargaining processes thereof and the limitation of the United Mine Workers as an organization of — a voluntary organization of human beings.

Q. In the carrying out of the objectives or the organization as set forth and as I have read them, have there been negotiations for collective bargaining agreements between the owners and operators of mines on the one part and representatives of the United Mine Workers of America on the other? A. Oh, yes. Practically since the beginning, the foundation of the organization in 1890, and continuing up to this time. The bargaining, the mechanics of the bargaining and the geographic areas representing the bargaining conferences by representation from management and the union have varied at times by rearrangement, by shifting volume of production, economic conditions and so forth.

Q. Have there been shifting volumes of production
2431 from different areas of the United States to other areas so that some that once produced larger quantities now produce smaller, or at least percentage wise? A. There has been a great shifting of volume of production in the various areas.

Q. In the early days of the industry, or back at the time when you first became officially connected with it, what was the largest production area in the bituminous coal fields? A. The largest production area at that time was what came to be known as the central competitive field in the mining industry.

Q. Would you explain it a little, please? A. It embraced four states, Illinois, Indiana, Ohio and western Pennsylvania, which at that time were the main producing districts for commercial coal, and produced about two-thirds of the annual production of the nation. The effort was made to arrive at a base in the central competitive field, which became the guide line of the various outlying districts as they

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were called. Some production in West Virginia, some in Kentucky, a little in Maryland, some in eastern Pennsylvania that was not embraced in the central competitive field, Iowa, Wyoming, New Mexico, Kansas, Missouri, Arkansas, they were outlying districts producing about one-third of the total volume annually mined; but from every
 2432 standpoint of stability they did not wield the influence in the industry that the central competitive field did.

Q. Collective bargaining agreements at that time in those earlier days were entered into usually first, I take it, by the United Mine Workers of America and the operators in those districts, in that central district, that central field? A. That is right.

Q. And then were agreements also entered into between the operators in the outlying fields and the United Mine Workers of America? A. Yes, premised upon the central competitive field settlement, insofar as was deemed proper by the parties of the conference.

Q. During these negotiations for those contracts, then and continuing on down to the later years, what has been the objective of the United Mine Workers in the conferences? A. In which conferences?

Q. In the conferences that were held to determine a contract, what objective was the United Mine Workers putting forward in all these conferences and meetings, negotiations?

A. Consistent with the declared objectives of the
 2433 union, which were written substantially as they read now in the constitution, by the founders of this organization about 70 years ago, and modified at times by existing economic conditions, the inability of the union to accomplish those objectives in the face of the opposition which it encountered, the limited means of the mine workers, the men who worked in the mine, and all of the other circumstances attendant upon those conditions. Invariably they were the objectives.

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Q. Was it at any time during the period that you have had official connection with the United Mine Workers of America the objective of the United Mine Workers to put out of business any coal operator? A. Never at any time. To the contrary, the union was dedicated to the proposition of encouraging those men to become members of the union and join with their fellows throughout the national industry in improving their common lot, raising their standards of living, increasing their compensation, providing for better working conditions, less hazardous, and providing — seeking to establish a basis of living, to add to their material well being and enable them to provide for the evil years that faced them all in the end.

Q. What, if anything, does the union have and has it had during the years to do with the picking of the negotiating parties who represented the industry or the operators? In other words, who has chosen the operators that appeared, who has chosen the negotiators who appeared on behalf of the operators? A. The various coal operators associations. There are national associations and there are local associations, of which there are a substantial number. Operators in their given area, county perhaps, or in a given area where working conditions and mining problems are somewhat similar they form a local association which conducts the local negotiations during the pendency of a contract, on interpretation of the contract, and affecting the grievances of the men under that contract during its life.

2435 Q. I take it those coal operators associations have varied in size from a small number of operators in a particular association to larger numbers in other associations. A. Quite true, sir. The original representation in the central competitive field in 1898, when the first central field contract was negotiated, there were eight operators and eight representatives of the Mine Workers from each of the four states. The operators likewise were represented

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by eight men from each state making the negotiating conference have a membership of sixty-four individuals.

In order to function in parliamentary fashion, special committees were created that studied and made report on specialized subjects. They were called sub-committees. The sub-committees varied in size from two or three on each side down to one man on each side, and during the years that came, that membership was slightly decreased, became a more normal representation.

At times, all of the miners and operators met in what is so-called joint conventions, too large to be really constructive, but offering a platform for the principal figures on both sides, to publicly enunciate their viewpoints in defense of their respective positions, and during the years, it's been changed at various times in various ways.

Quite frequently at all times during the years that 2436 Mr. John Mitchell was president of the organization, oft times he and the leading operator in the central competitive field, having the confidence of his associates, would go off on a two-man committee to see whether they could work out a program to recommend in proper sequence to the negotiating committee, to recommend to their respective memberships.

Every resource to arrive at a common understanding was utilized from time to time during those years.

Q. How were the representatives of the union, men who negotiated for the union, selected? In what manner were they chosen? How were the unions or the men in the unions kept advised of what was going on in these negotiations over the years? A. Under the authority of a constitutional convention of the United Mine Workers, held from time to time, a policy committee was created to deal with wage negotiations between conventions, and a designated number of representatives served on the policy committee from each of the several districts of the United Mine Workers of America.

That was really the negotiating conference. The membership of that committee varied from time to time, and its membership ranged at different times from one hundred to one hundred twenty individuals to as high as two hundred individuals at times, all with equal representation proportionately from each of the several districts of the union.

2437 They would appoint or select a scale committee, the actual number of representatives that would meet in joint conference with the operators' representatives. This scale committee would report back to the policy committee its progress or its non progress from time to time.

The policy committee had a warrant from the constitutional convention giving it full jurisdiction between conventions as the responsible organization to decide those things, all things pertinent, between the conventions.

Q. There have been consummated, of course, between these various operator groups and the United Mine Workers of America over this period since you have been president many different contracts have there not? A. Quite so.

Q. The basic agreement in effect at the present time I believe we know in this record as the 1950 agreement, as you are aware. A. Yes.

Q. But there have been certain amendments to it since it became effective in March, 1950? A. The 1950 agreement as modified from time to time.

Q. As modified, yes. A. As amended rather.

2438 Q. What was the agreement known as, the one that was just prior to the 1950 agreement? A. Oh, it was the agreement known from time to time as the current agreement between certain dates, known by the agreement of certain dates.

Q. Well, the one I am referring to is the 1948 agreement which you recall. Now, I believe the 1948 agreement had a provision with reference to cancellation, that either party—

Mr. Kramer: And this agreement is in the record, I am

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not going to take time to read the various provisions, Your Honor.

By Mr. Kramer:

Q. — had an agreement in it with reference to cancellation upon notice of either party.

Do you recall whether the operators gave notice to the union of cancellation of the 1948 agreement? A. Are you referring to the cancellation by the Southern Coal Operators Association that year? I think that was the year.

2439 Q. Yes, sir. A. Yes, I recall that.

Q. Had the United Mine Workers given any notice of cancellation? A. No.

Q. After the Southern—well, before I get to that—what area comprised what you referred to as the Southern Operators Association, in general terms? A. That was the group of operators who called themselves representatives of the southern mining companies.

Q. I take it it included— A. And embraced townships in Southern West Virginia, Virginia, Kentucky, Tennessee, Southern Appalachian contract, and I think the commercial operators of Alabama.

Q. That contract, and I am referring now to the 1948 contract, had the clause in it that it could be cancelled after a given time by either party after sixty days notice. A. That is right.

Q. And the Southern Operators gave notice of that cancellation? A. Yes, they did.

Q. I believe that was in the early part of the year, 1959, probably February, or about that time, is that about
2440 right? A. That is right.

Q. February, 1949. What followed after notice was given? I say "followed", I mean as far as negotiations are concerned, or dealings with reference to a contract?

Somebody tells me I am wrong, Mr. Lewis, that that was April rather than February or March. I thought I had a note here, but I can't find it.

Anyway, it was in the early part of '49, after having given that notice, what occurred? A. For the time being, nothing occurred. The southern operators had expected that the United Mine Workers, when in receipt of this sixty-day notice of termination, would likewise issue a sixty-day notice against the northern operators which was the preponderance of the tonnage of the country.

The United Mine Workers did not give such a notice.

Then it became apparent that a unique situation was developing, that the southern operators would sever their contractual relations with the United Mine Workers on a given date, sixty days from the day of their notice, and presumptively wouldn't operate their mines. But it became increasingly aware of the menace to their established business if the northern operators kept on working.

Later, it resulted in a joint conference being held 2441 in Bluefield, West Virginia with the Southern Coal

Producers Association or representatives, and a conference with the Northern Coal Operators Association Association at White Sulphur, West Virginia. Some of the representatives of the United Mine Workers attended the Bluefield conference, and some the White Sulphur conference.

It was not the desire of the Mine Workers to in any way disturb the equilibrium of the company at that time. They would not have given any notice, but in the end we were compelled to give notice to the Northern Operators and assemble this conference in order to prevent too wide a gap between the two contract expirations which had been rather disastrous for the commercial interests in the industry.

Q. So that following those meetings, you did, the United Mine Workers did give notice of cancellation of the contract, collective bargaining agreement that was in effect with the Northern Operators? A. Yes.

Q. After those two contracts were terminated by these notices, were negotiations entered into with reference to

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the entering into a new agreement? A. Did such negotiations ensue you mean?

Q. Yes. A. Yes.

2442 Q. Did those negotiations continue over a long period of time? A. They did.

Q. In other words, there were substantial differences in opinion between the owners and operators of the mines and the union as to the proper terms to be written into that contract — A. Yes.

Q. Were they not? A. Yes, sir.

2443 Q. During the period when these negotiations were carried on, being carried on, did the mines operate on a partial basis and the union members function during part of that period, and if so on what basis? I am referring to the three-day work week, Mr. Lewis. And explain, please.

A. The so-called three-day work week came about in this manner. At the time the work in the mines was suspended the United Mine Workers knew that every need of the country was being met because we had an exact number of the amount of storage of coal above ground and where it was located, and so forth, and we knew that there was no emergency. But the newspapers of the country and the public press and some of our public officers, begin to bring that out as a contingency facing the nation—that the nation was going to be short of coal by reason of the controversy between these conflicting interests. They wanted the Government authoritatively to request the mine workers to work pending negotiations.

The mine workers knew that there would never be any termination of the negotiations as long as the mine workers worked pending negotiations, but in order to abate the public concern as to a possible shortage of coal in new quarters the mine workers agreed to return to work pending negotiations, conclusion of negotiations, subject, however, to this qualification. That a three-day work

2444 week would assure the country an ample supply of coal for all public services and every personal in-

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dividual requirement. So that we offered to work three days a week and accept the work pending arrangement and instructed our membership likewise.

Well, the operators attempted to believe that we were asking, trying to impose a three-day work week on the industry in perpetuity, which of course was not true, and a great clamor went up about the mine workers' position on the three-day work week.

We were roundly criticized in some quarters, mostly by interests who failed to comprehend the strategy that was involved in such—the protection of the public interest and at the same time penalized the operator for not working the remaining days of the week if they were able to work the remaining days of the week.

As a matter of fact, sir, if the United Mine Workers were offered a three-day work week voluntarily by the operating interests of this country, we would become compelled to refuse it, then and now, because it would be too restrictive on the income of the members of the United Mine Workers of America and be by far from equitable to require a man to live in the tenements of a coal mine with the opportunity of working three days a week and remaining idle four days of the week. Perfectly absurd from an economic standpoint, from a personal and humane standpoint. The operators well knew that, but they were perfectly willing for the public to believe that our motives were ulterior and sinister. They were not.

It was merely a small piece of strategy designed at the moment to create a little discomfiture in the operators' ranks while they were disinclined to make an agreement and abate the controversy.

Q. In other words, it was used during the period of negotiations as a strategic move but at no time did the United Mine Workers ever demand the inclusion in a contract of a three-day work week; is that correct? A. That

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is right on the three-day work week. There have been demands and requests in time gone by for the five-day work week in accord with the trend of the industry and requirements of the country but nothing further than that.

Q. I want to ask you particularly this question because of the assertion made in the present lawsuit, Mr. Lewis. Did the United Mine Workers, as one of the requests to be included in the 1950 agreement, demand that the operators enter into a three-day work week? A. The United Mine Workers of America did not make any such statement or demand, and the United Mine Workers of America today if offered a three-day work week would have to decline its acceptance out of hand.

2446 Q. Now Mr. Lewis, I want to talk a minute about wages as the United Mine Workers have stood for wages of these people who are employed in the coal mines.

What has been the policy continuously of the United Mine Workers from your years connected with it officially down to the present time on the wage structure?

Maybe I ought to start out, do you recall what the wage increase was that was included in the 1950 contract when it was finally negotiated? A. All of the gains made during the 1940 to '50 period were consolidated in the 1950 agreement, written in.

The Government, on several occasions between 1940 and 1950, seized the mines by Executive Order of the President and operated upon the account of the Government and would call upon the mine workers to work for the Government during the pendency of that seizure.

The mine workers would do so and work out an agreement with the representatives of government to govern the mines during the period they were under government control.

Various things were agreed to, including the introduction of the Welfare & Retirement Fund. The limitation on work day to eight hours underground as against eight hours at the working place far inside the mines from the

place of entrance. The payment for travel time, the
2447 payment for "lunch time, and various other items
which were negotiated with the Government.

The operators encouraged the Government to seize the
mines to increase the responsibility of the mine workers.
The Government and the mine workers would cooperate and
agree on these items of consequence. The operators would
then demand their mines back, but one of the conditions
of terminating the Government control was that the oper-
ators would have to agree to write into the agreement all
of these things that we had negotiated with the Government
while they were utilizing our mines, the operators' mines.

All of those things in the end were accepted by the coal
companies of this country after being instituted by the
Government of the United States, after having their mines
returned so they could operate them on their own account.
Those items I have mentioned and a number of others were
assembled and written into the 1950 agreement.

Q. The 1950 agreement recites on its face, as I recall it,
that the wage increase which was granted by that agree-
ment was a wage increase of 70 cents per day, as we call
it, across the board. That is for all job classifications. A.

That is my recollection, sir.

2448 Q. Seventy cents a day was the increase. During
the period that negotiations were going on and the
period between the date that notice was given of the termi-
nation of the 1948 agreement in '50, was there some sub-
stantial litigation between the—well, instituted by the
Government and operators? A. Oh, yes, during the period
of the '40s particularly, and '49.

Q. And after the litigation was terminated was the 1950
agreement immediately executed? A. Yes, substantially.

Q. Now with reference to certain of the clauses in the
1950 agreement or subsequent agreement to which refer-
ence has been made in this lawsuit, I want to mention one
or two of them. One I want to refer to is what is known

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as the "land lease" provision which, I believe under the record, it is already here in front of the Court, originated with the 1943 agreement — that is, the 1943 collective bargaining agreement between the operators and the miners or the miners' union.

What is the land lease provision, in substance? Maybe I ought to ask what is its purpose, the provision of the agreement which provides that the operators will not lease lands, coal lands that they own to other operators for the purpose of subterfuge or in order to effect an unfair wage scale. Tell us about it, please.

2449 A. The land lease arrangement or demand on the part of the mine workers was merely to tighten up the processes of collective bargaining and prevent any coal company from chiseling away at the agreement and by subterfuge sub-leasing or sub-contracting certain parts of the work essential to a coal mine or mines.

We wanted to deal with the same employers as affecting all the operations of the coal mine of which he was the owner or the representative of the owner, and it was merely done to eliminate the sub-contracting to irresponsible individuals without credit or assets who frequently failed to meet their payrolls and cause destitution and poverty among our people and increased it.

There are many ramifications of those chiseling practices by irresponsible operators but those are the chief reasons why the mine workers desired that.

Q. The first time that this is inserted in one of these contracts — these contracts are all in the record, if your Honor please, — this reads thus:

"The operators agree that they will not lease any operating mines subject to this supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement."

Is that the way you recall it? A. Yes.

2450 Q. In other words, in order to prevent an operator from subleasing his property out to someone that would produce it at a sub-normal price after he had signed an agreement? A. That is right, sir.

Q. Was that done for the purpose — was the entering into of this land lease provision in these contracts and the carrying of it through the contracts for the purpose of forcing small or other operators out of business? A. Oh, no. It had no relation at all to that question. It was merely protecting the wage standards and the conditions of the working miner.

Q. And for that purpose alone? A. That is right.

Q. The question is raised about the so-called protective wage clause which is in the 1958 agreement. I mean — yes, the 1958 agreement. And I read from the portion of that clause or a portion of that clause that is contained in the 1958 agreement:

"It is recognized that when signatory operators mine, prepare, or procure or acquire under sub-contract arrangements bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions, and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the operators agree that all bituminous coal mined, produced or prepared by them or any of them, or procured or acquired by them or any of them under a sub-contract arrangement, shall be and shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

Will you comment on it and explain the purpose of it and why it was entered into?

A. Substantially for the purposes enumerated in general terms in that contract. There had grown up in the mar-

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keting area of the coal industry certain practices that impacted severely upon the membership of the United Mine Workers, affected the stability of their joint industry contracts and impaired their annual earnings and the future security of their jobs.

For instance, a coal company might engage to deliver a million tons of coal to the docks on the upper lakes or in the Canadian market or to a public utility in the United States, or to any other consumer of coal in volume, at a certain price based on his cost of production, all of those things being jointly agreed to between the contracting parties.

He would then go out on the highways and by-
2452 ways and he would buy himself a half million tons of coal from mines that were working at sub-normal wages and sub-normal conditions, below the recognized American standards and below the wages paid to the original operator that had a contract with the United Mine Workers. The result would be that mine would lose half of the employment providing, mining a million tons of coal. Their work would be interrupted. The operator would blend this half million tons of coal with the half million tons of coal produced at his own mine and increase his profit under the contract by the margin that he could save, at the price of depreciating work opportunity for the men that he employed.

We felt that was not a good thing carrying out the contract. It was not constructive and made the mine workers the victim of the market manipulation. That was the chief and only reason, outside of those enumerated there, why that was done and insisted upon.

Q. In other words, the purpose of the insertion of this clause was to protect the members of your organization as your constitution provided you should protect them? A. And only the members of our organization.

Q. Did you insist or the United Mine Workers insist on

that inclusion of the provision into the 1958 agreement? A. Yes.

2453 Q. What about the operators, were they docile to it or were they bitterly opposed to it? A. I think there was some objection, not impressive on the part of some of the operators and speaking for the record sometimes, but we encountered a healthful reaction among most of the operating companies.

Q. But the provision was inserted upon your insistence? A. Upon our insistence.

Q. Of the United Mine Workers? A. Certainly so. They would not have considered it for a moment without our insistence.

Q. And was the same thing true of the land lease provision we talked about a few minutes ago? Was that demanded and insisted upon by the union? A. Oh, yes, sir.

Q. In other words, it was at the insistence of the union that these two clauses went into these contracts? A. Quite so.

Q. You recall that back prior to 1957 there was a provision in the agreements or about that time, known generally as the union security clause in the agreement? A. Yes.

Q. Whose purpose, I believe, was recited to be for the protection of the membership of the United Mine
2454 Workers of America? A. Yes, sir.

Q. That was abandoned later or modified substantially in the later agreements, beginning with the 1952 agreement, was it not? A. Yes, sir.

Q. And at any time since 1952 and the enactment of the provisions, 1950 — what did I say? 1950, that was the 1950 agreement. I am mistaken. The 1950 agreement, the clause that has been in there has been the same and the union has insisted upon its operation, carrying it out, since 1952? I will read it to you, Mr. Lewis, and I am reading from the 1952 contract:

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"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

Now that is the clause that has been carried in since the 1950 agreement? A. Yes.

2455 Q. Oh, there is a slight change in the first sentence between the one I read earlier and '52, but since 1952 that has been the exact language? A. That is right, as I recall it.

Q. Mr. Lewis, what was the origin—you have mentioned it briefly a moment ago—but what was the origin of the Welfare Fund or Welfare and Retirement Fund that is carried presently as a provision in the contract of the United Mine Workers of America with the operators? A. It was negotiated on May 29, 1946 with the Secretary of the Interior who was acting as the agent of the president in the administration of coal mines seized by executive order. It had been one of the demands of the mine workers of the year previously in the joint conference with the operators and was resisted by the operators successfully. We pressed a fight for its recognition in 1945. The mines were seized by the government and then the government negotiated substantially the welfare clause that exists today, except for the changes in the amount of the royalty payment.

The declaration of principles and the purpose of the trust created under this joint contract with the government were defined, and they are still a part of the existing agreements made subsequent to that time. Substantially it was
2456 intended to provide medical service, hospitalization, pensions, rehabilitation and opportunity for injured

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mine workers, training them for other jobs, if they recovered sufficiently, to make it medically possible, and was hailed as a tremendous step forward by the government in the humanitarian treatment of the men who were employed in this most hazardous of all industry.

Counsel will understand, I hope, that aside from the fatalities and hundreds of thousands of injuries a year, mine workers are affected by vocational ailments that shorten their lives, a long list of them, and the rate of fatality from many of the pulmonary ailments is much higher among coal miners than it is the rest of the population. So the mortality they suffer and the human agony that they and their families endure is greater than can be compared with any industry now in existence in the civilized world.

2457 So, the succeeding agreements that have occurred since 1945, '46, have carefully included the welfare plan, the trust agreement, and the grant of authority from the industry to operate. They might have taken away in those conferences, if they had been able to, the miners' shoes and his wages, but he couldn't take away, they couldn't take away the welfare fund, more valuable than silver and gold or pearls of great price, and the progress that has been made. The medical treatment of mineworkers since that time has been an astonishing progress, that has lengthened the lives, increased the well being, made for less widows and orphans in the industry than any other institution that has had to deal with the mine workers since the 10th century when coal was discovered in the Forest of Deane.

Since that time, may I add, since 1946, perhaps, there were no welfare arrangements or pension plans except a few weak images of plans established by a few corporations in the country and dominated by them, and now the Department of Labor reports that over seventy million

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workers in American industry are covered by some form or other of negotiated welfare and pension plans.

It must have some virtue to be accepted and sought by seventy million workers whose clamor and demand for that protection has been enforced by nearly two hundred million Americans.

2458 Q. In other words, the United Mine Workers were the pioneer in the setting up through this negotiation—first rejected by the operators and then accepted by the Federal government, and then carried back into the later contracts—have been the pioneer in the establishment of welfare funds of this nature? A. That's right.

Mr. Kramer: Now, Your Honor, I want to read from the contract of 1950, the provisions with reference to the Welfare and Retirement Fund rather than ask the witness to read it, and I read from page 3 of the Collective Bargaining Agreement of March 5, 1950.

This is one, Your Honor, in which they say is the beginning of the time of the starting of the conspiracy, and I want to read what the Welfare Fund is.

"It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund of 1950.'" During the life of this agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, Dis-

2459 trict of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee

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appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

"The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado, is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

"In the event of a deadlock on the designation 2460 or agreement as to any future neutral Trustee, an impartial umpire shall be selected—" and sets out the method, Your Honor, and I am going to omit that clause if I may.

"It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

"It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise

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compensated for at all or adequately by tax supported agencies created by federal or state law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,'—"

That is the Congressional enactment. "— as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947,' Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act of 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters."

I am omitting two paragraphs there unless you want me to read them.

"Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject to any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge; and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys

in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, that is, the beneficiaries of said Trust under the terms of this agreement.

"The obligation to make payments to the 'United Mine Workers of America Welfare and Retirement Fund of 1950' under this contract shall become effective on March 6, 1950,—"

And then provides for dates of payment.

"It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto."

It provides for an annual audit of the Fund by competent authorities designated by the Trustees.

I believe that is all I care to read.

By Mr. Kramer:

Q. Mr. Lewis, when we recessed a few moments ago, we were talking about, or had just finished reading a portion of the Collective Bargaining Agreement of 1951, which set forth the welfare and retirement provisions, that is, the trust provisions, as contained in that contract.

I want to talk now, or ask you briefly about this—your connection with the Welfare and Retirement Fund, United Mine Workers of America Welfare and Retirement Fund.

Mr. Lewis, you have been a member of the Board of Trustees of this welfare fund since 1950, and were also a trustee of the previous fund under the 1946 and '47 contracts. A. That is correct, Mr. Counselor.

Q. There has been, as I understand—if I may just lead

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just a moment—there has been two changes, I guess, in the trustees—no, just one—since the 1950 fund was started. Mr. Owen died and he was succeeded by Mr. Schmidt. A. That is right.

Q. And you have been the one that's served continuously as selected by the United Mine Workers, and Miss Roche has been the neutral member since then? A. That is right.

Q. Now, according to this record, the meetings of the Trust are held five or six times a year—

Mr. Kramer: Any objection to leading a little here?

Mr. Rowntree: No.

By Mr. Kramer:

Q. —five or six times a year, and they are held in Washington? A. That is right. I think once or twice there have been meetings held elsewhere, but Washington is the rule.

Q. I think there is evidence here that because of 2465 the illness of one of the trustees, two meetings were held in Florida. Mr. Owen was ill down there. A. That's right.

Q. Have you attended all or practically all of the meetings of the Trustees? A. The only ones at the moment that I can recall missing was such as might have been held when I was abroad on a government commission a few years ago. I was gone some months.

Q. Mr. Lewis, of course as chairman, you preside at these meetings of the trustees? A. Yes.

Q. Are minutes kept of the meetings of the trustees? A. Are they what, sir?

Q. Minutes kept of the meetings of the trustees? A. Yes.

Q. And Mr. Mitch, who is the general counsel, is also secretary of the Trustees and keeps those minutes? A. That is right.

Q. Are the minutes of the meeting submitted for approval, correction or changes at the next meeting of the board? A. Yes, and passed on by the trustees.

Q. And passed on by the trustees and approval 2465a or correction shown? A. That is right.

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Q. Mr. Lewis, in governing or giving of pensions, or the paying of pensions and of other benefits from the fund, are the methods and the requirements for those payments of benefits set forth in resolutions adopted by the board? A. Yes.

Q. You adopt resolutions? A. All the rules and procedures, the qualifications of the petitioning beneficiaries and all the matters of general policy are decided by the trustees. Miss Roche is the director of the fund, and administrator of the fund pursuant to the trustees' policies.

Q. Is union membership—and by that I mean membership in the United Mine Workers of America—a requirement in order to be paid benefits or receive benefits from the fund. A. No.

Q. Has it at any time since this 1950 agreement came into effect been a requirement? A. No.

Q. Have benefits—do you know of your own knowledge that benefits from time to time have been paid from this fund to members—I mean employees of signatories who were not members of the union? A. Yes.

2466 Q. Of course, I don't suppose you know how many of them. A. I do not, and necessarily they would be limited in number, because it is very rarely you find a man who wants—who is working in a mine and not a member of the union who wants the Welfare Fund to compensate him.

Q. And you do not know how many there may have been of that kind? A. No, I do not.

Q. That have been paid since 1950? A. I do not.

Q. Mr. Lewis, has there ever been a demand made by the Trustees so far as you are aware that a man who was receiving a pension or other benefits from the Fund was required to appear on a picket line in order to maintain his benefit status? A. That is an absurdity that never existed in reality, never is the answer.

Q. There never has been any such requirement at all, has there? A. No, sir.

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Q. Made by the trustees? A. No.

Q. Okay. Mr. Lewis, do you receive any salary
2467 incidental to serving as a trustee? A. No.

2468 Q. Have you ever accepted any salary? A. No.

Q. Have you attempted to in any manner dominate the actions of these trustees over and above the votes of the other two trustees? A. Well, I think a great many meanings have been attached to the word "dominate" but I do not think that any of those meanings could refer to me as a trustee of the Welfare Fund.

I am merely one of three trustees, and to the best of my knowledge and belief I am the least vocal of all the trustees. And never at any time have I undertaken in any improper manner to change the view of any one on the Welfare Fund.

Q. Have you ever at any time attempted to force or to compel or to get the trustees to favor employees of one signatory over the employees of another signatory in the receipt of benefits? A. Never.

Q. Has anybody else ever attempted, any of the other trustees, so far as you know, ever attempted to do any such thing? A. I think it would be quite useless for anybody else, including myself, as long as Miss Roche is trustee and administrator of the fund.

2469 Q. You think she is going to see it is going to be carried out in a proper way? A. Not that there would be any intent to do so under any circumstances—

Q. I take it she is the most vocal of the three, isn't she ordinarily, in the meetings? A. Well, it is my wish not to testify on that point.

Q. All right, Mr. Lewis, we will not press the question inasmuch as she happens to be sitting in the courtroom this morning.

There is something in this record about an informal meeting—I guess we would call it—of the trustees, you and Senator Bridges, under the previous trust, not under

the 1950 contract, before the 1950 trust came into existence, when there was some question about Judge Dawson attending a meeting or coming to the gathering. Do you recall that incident? A. Yes.

Q. Did Judge Dawson come to Washington when the other two trustees were there, you and Senator Bridges? A. Yes.

Q. Do you recall when that was? A. I don't. In the sequence of the years I don't recall the date of it.

2470 Q. It was in 1949, according to this record, because it was before the 1950 trust came into existence. A. That fits in with my recollection.

Q. Would you care to comment on what occurred there, very briefly, Mr. Lewis, just briefly. A. Mr. Van Horne, who was the operators' trustee on the—

Q. Under the old fund before the new one came into existence? A. Yes.

Q. Go ahead. A. —was receiving a salary from the coal operators in Ohio, holding office for them, and he also took a salary which had been fixed by the Government in the case of Captain Collison, a previous Government trustee, of \$35,000 per year, and the operators claimed they were not advised of the double salary and he came into disrepute and disfavor and he got mad and gave a qualified resignation. He was not angry at the trust fund. He was angry at the operators who were criticizing him in his own organization.

Q. That was Mr. Van Horn? A. As I understood his attitude. So Judge Dawson appeared on the scene, having retired from the federal Bench, and said he had been retained by the operators and elected by them as the
2471 trustee-elect, and he was given a hearing at two informal meetings of the trustees, remaining trustees. But it was our opinion that there was no vacancy and the trustees could not legally accept him in a qualified position on the board of trustees because there was no vacancy.

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Van Horne's resignation had not been accepted and it was not in a form that could be accepted.

So that is all there is to it.

Judge Dawson later ceased his efforts to be seated as a trustee. There were only two conferences at which time the trustees informally discussed the matter with him, with the greatest of courtesy, I might add. And the vacancy remained until Van Horne finally did resign.

I hope I have made myself clear there.

Q. Yes, Mr. Lewis. Was there any business transacted when the three of you were there—you, I believe Senator Bridges was the other one at that time? A. Yes.

Q. You and Senator Bridges and Mr. Dawson were there, was there any business officially transacted at that meeting, those two sessions? A. No. This is an informal discussion with Judge Dawson.

Q. Did Senator Bridges, the neutral trustee of that fund, that other previous fund—did Senator Bridges 2472 agree with the position you took generally or with the position that Judge Dawson took or sometimes one and sometimes the other; what was the situation? A. Well, I think in general without remembering the exact facts now and the sentences and words used, that on some points Senator Bridges agreed with Judge Dawson and that on some points he disagreed with Judge Dawson and agreed with me, which did not disturb the balance.

Q. That was shortly before the 1950 agreement was signed, was it not? A. As I recall it.

Q. Then in the 1950 agreement the three trustees were named, you as designee by the miners, Mr. Charles Owens as designee by the operators, and Miss Roche as the neutral trustee? A. That is true.

Q. Judge Dawson never came back any more, did he; no more meetings with him? A. No.

Q. I will pass back, Mr. Lewis, to your connection with the United Mine Workers of America—going back from

the trustees, or transferring over from the Trustees' portion.

Do you know of a coal corporation by the name of West Kentucky Coal Company? A. Yes.

2473 Q. It has been testified here that the United Mine Workers of America has or is the owner of some stock in the West Kentucky Coal Corporation, the first of it having been bought sometime not far from the year 1951; do you know? A. Yes, I know it was purchased.

Q. You know the stock was purchased? A. Yes.

Q. For what purpose did the United Mine Workers of America buy stock, shares of stock, in this corporation? A. Because the United Mine Workers had idle money that they wanted to put to work to invest. They wanted to do so in such manner as would benefit the members of the United Mine Workers of America and be to their advantage in the industry, and because we were familiar with any of the problems of the coal industry and have a reasonable understanding of the problems of any major coal company in any district of the United States.

Q. Did you and the other representatives of the United Mine Workers of America charged with the investment of United Mine Workers of America funds think
2474 this was a good investment? A. Yes. Yes, that was a very good investment, because we were familiar with the assets of the company, the type of the coal, and strategic location on river transport, and we think that that company has an intrinsic value many times worth what it appears to be in the market.

Q. As I recall in the deposition that was taken of you, and perhaps some other time, someone raised the question that the current market price of the stock of West Kentucky Coal Company has at times been less as quoted on the New York Stock Exchange than what the United Mine Workers of America fund paid and that you did not sell the stock at that time. A. That is right.

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Q. Why didn't you? A. It was not to our advantage because we did not invest in the West Kentucky Coal Company stock for the purpose of making a capital gain or a profit. We wanted to make a contribution to the wider employment and the greater employment of the members of the union in that area, and we thought that the company had a great future and a great intrinsic value which would develop when they were able to refinance themselves and catch up with the obligations that they incurred on the purchase of many of the assets of the company.

2475. For instance, one of those assets was the Nashville Coal Company which West Kentucky acquired. And the West Kentucky went off a dividend basis largely, I understand it, in order to pay the payments for the Nashville Coal.

No reason at all in the face of existing circumstances of the industry that the West Kentucky Coal Company could not appreciate its market value in the future, and I recall, counselor, this vital affect.

The stock was selling at 35 for a long time while our investment in it did not average 26. We could have sold out for a profit and taken our small profit and got out, but that would be merely speculation on stock market values and it is of no advantage to the members of the United Mine Workers.

Q. So you did not sell when the stock went above what you paid for it and neither did you sacrifice it when it went below? A. That is right.

Q. But you continued to hold it because of its future prospects and the opportunities for increased employment, and so on, in the area as an investment? A. That is correct. As far as my knowledge of the subject goes and my judgment.

Q. Mr. Lewis, there is something said in this record
2476 about—that the United Mine Workers of America made some loans to Mr. Cyrus Eaton, and that he

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used it to buy some stock, perhaps he or some of his companies, in West Kentucky Coal Corporation.

Would you comment on it, please. A. Yes. Mr. Eaton was a man of acknowledged industrial success and one of the leaders in the financial and industrial world of the country whom I had known for a long time, and we invited him to make a joint venture with us in the West Kentucky purchase of stock, and we loaned him some money to buy stock. We took the stock as security, and that is the arrangement that was worked out.

Q. Something has been said here with reference to those loans made to Mr. Eaton, or made to some of the companies like the Chertsey Company or one of the other companies he was interested in, as to the type of provision in the notes given with reference to interest in dividends and that the interest, or about a part of the dividends that would be received from the stock if paid by the company.

Would you comment on it, please. A. That is right. Any profit occurring from the joint enterprise in the investment were to be split mutually, 50 per cent to each. We could not ask Mr. Eaton to do so and lose his own money, so we divided the profit like joint partners in any enterprise.

2477 In addition to that, in the argot of the market place he gave us a call and we gave him a put. That is the way it is described in the security market day by day and there are hundreds of thousands of such agreements made daily and weekly.

2478 In other words, the notes, I think the promissory notes, secured by the hypothecation of the West Kentucky stock. They have been renewed annually since that time, or whatever their maturity dates are. They may have been changed since I have been gone. I don't know.

There was no thought when the market dropped in value of West Kentucky of asking for more security because

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there was no intent to sell the security, and we were conscious of the intrinsic value of the West Kentucky Coal stock and familiar with its reserve assets. It had over a billion tons of reserve coal adjacent to the river, strategically located in the center of the steam coal consuming market at the present and in the future.

Chemical plants are going to locate on our riverways and many other industries. The DuPont Company in its stockholders' report as of last week predicted that the chemical industry will expand for the next ten years twice as fast as the national rate of economic expansion. And it is going to come near the rivers where there is cheap coal and transportation and access to markets.

So we think that West Kentucky Coal Company is something worthwhile as a long term investment, not only financially but in the interest of our members in that area who are given employment, who have been raised out of their previous servitude and are more prosperous 2479 than they ever were in all their lives. And in that respect, the money of the United Mine Workers invested there, which is primarily acquired, paid in by the members for the use of the union in promoting the well being of the members, that has brought a great return already, enough to justify the investment.

Now on the question of why didn't we ask for more security. Our complete confidence in the final success of that corporation, if efficiently managed, and that is an obligation of the management and their board of directors, with which we have nothing to do and do not attempt to exercise any influence in the management of West Kentucky mines or any other coal mines in the United States. We have a standard clause in our agreement that has been there for decades of time, quoted as follows: "The management of the mine, or mines, the direction of the working force, is exclusively vested in the coal operator and the United Mine Workers of America will not abridge this right."

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We follow that out. We hold the operator responsible for the management of the mine, and far be it from the United Mine Workers of America to encroach on his prerogative, because we have troubles of our own and work to do.

Q. Even though United Mine Workers is a substantial holder of stock of the West Kentucky Coal Corporation? A. Even though the United Mine Workers is a substantial holder of West Kentucky stock, we do not interfere with the management and have not done so at any time and have no future intent to do so. There can be no conflict of interest between the obligation of the officers of this union to its membership. I would rather see the entire West Kentucky account go down the drain than to permit the losses or injury of the members of the United Mine Workers of America. We owe fealty to no other consideration except to the men who employ us, who gives us their confidence, and as far as I am concerned, whose bread I eat, whose song I sing.

Q. West Kentucky Coal Corporation today, I believe, is a signator to the 1950 collective bargaining agreement as amended, is it not? West Kentucky Coal Company is a signator to the agreement? A. Oh, yes.

Q. They were not at one time members, were they? A. No.

Q. I will ask you whether as a stockholder you people have put pressure on them as a stockholder of the corporation or on Mr. Eaton to get them, to force them to sign a contract, or has that been voluntarily signed? A. None whatever, because Mr. Eaton was obviously a sagacious businessman of wide repute and eminent success and enjoys the reputation of being liberal in his
2481 viewpoints in relationship to labor and its industry.

We knew that as a practical proposition it would have been foolhardy and not wise judgment to attempt to operate an industry of that magnitude without having the goodwill of the miners as expressed through membership in this union.

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Q. Now going back just for a closing question on the value of these securities, why of course I recognize that you are not a securities information house, advising the crowd here this morning to buy any particular stock, West Kentucky or anything else, but you still say the investment of United Mine Workers, in your opinion and in the opinion of the United Mine Workers, was a good and is a good sound investment? A. Oh, yes. Oh, yes..

Q. All right. A. I have the fullest confidence in the future of the company.

Q. Do you know anything about the pricing policies as between West Kentucky or others and Tampa Electric Company? A. No, I do not know, except in general that there is a controversy. I don't know what it is about or none of the details.

Q. You have not been interested or taken any
2482 part in that? A. No.

Q. Nor United Mine Workers, so far as you know, has not taken any? A. No.

Q. Now there is a lot of proof in this record here with reference to sales made by West Kentucky and perhaps some others, coal companies, to Tennessee Valley Authority. What, if anything, have you had or United Mine Workers had to do in connection with those sales? A. Nothing of any kind. I read public accounts of the letting of contracts by the TVA. I see where contracts are awarded to a long list of suppliers. I see the contracts of West Kentucky in there. That is all we know. We are not consulted. We are not privy to it. We have no knowledge of it.

Q. And so far as the pricing policies that are adopted by West Kentucky or others in making sales to TVA, have you anything to do with the pricing policies that are followed? A. Emphatically no, not in any sense of the word.

Q. Mr. Lewis, there is some proof in this record with reference to the United Mine Workers of America buying

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some stock in the National Bank of Washington. Did
2483 the United Mine Workers buy some stock or did
it own some stock, shares of stock in the National
Bank of Washington? A. Yes, that is correct.

Q. In other words, did the United Mine Workers acquire
any stock in the National Bank of Washington? A. Yes.

Q. And why and under what circumstances was the ac-
quisition of this stock? As an investment, it would grow
in value, and for additional advantages of having a place
to use a common depository for our several funds, a matter
of convenience.

Q. Of course, the United Mine Workers of America has
had some funds, a substantial amount of funds perhaps
over some years. Prior to the acquisition of the stock in
the National Bank of Washington, where were your bank
accounts carried? A. Well, as I recall, they were different
places. We dealt with two or three banks in Washington
at various times. We tried to deal with one bank, but we
weren't welcome there. We just did the best we could.

Q. Then did you acquire, the United Mine Workers did
acquire stock in the National Bank of Washington for an
investment? A. That is right.

2484 Q. Was it acquired for the purpose of forcing out
of business any small coal operators or large coal
operators either? A. Emphatically not. No relation to it.
I don't see how it could, but that is immaterial.

Q. Mr. Lewis, it has been testified in this record, or there
is some indication that the United Mine Workers has at-
tempted to favor certain mines, because it was trying to
get them mechanized to the injury of smaller or other mines.
Would you mind going briefly into the United Mine Work-
ers' philosophy with reference to mechanization in the coal
industry? A. I think the first mining machine came into the
industry when I was in my teens somewhere and it was a
shearing machine. The mine workers called it the "Iron
Man", and some of them expressed dissatisfaction with it
because it ultimately would put men out of jobs, so they

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said. As the years went by, they were improved. Machines of greater versatility and maneuverability underground were developed so the coal was undercut, in addition to being sheared in a vertical fashion with the old machine. And from time to time it got so the operators of those machines and perhaps one man assisting on those machines were paid sums of money above the going rate that affected the daily wage rate of the men employed by the day with the company.

2485. And in later years the union never opposed the union machine —

Q. Never what? A. Never opposed the introduction of the machine, because we recognized that if this free enterprise system that exists in the United States, investment for profits, reward for incentive, capitalism, call it what you may, could only endure in the world of international competition, if it could expand its processes, increase productivity and given participation in the bounties of free enterprise and the natural resources which providence provided here in the United States; that otherwise there would not be an opportunity for your young men and women coming in increasing number each year in a rapidly expanding population, that we just had to improve the processes of mining coal, and we accepted the machine.

2486. We maintained this principle which we enunciated from time to time, that God didn't put in the mind of a genius an idea to create a machine that would do the work — displace ten men and do the work of ten or more, for the sole advantage of the coal operator, or the company that manufactured the machine, and we demanded a participation for all the employees in a mechanized mine in the advantages of the increased productivity. So that has been the case through the years.

The competitive relationships of the industry to the rest of the economy required the production to raise it.

Q. Explain what you mean by that, Mr. Lewis. A. I meant

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if the coal industry hadn't lowered its cost to increase productivity per man employed, it would succumbed to its competitor.

Q. What? A. To wit, oil, gas, diversified fuels made from either coal or petroleum bases, and world competition.

So, it was necessary for the coal industry to sell its wares in a market that critically looked at prices always, and turned to substitutes if the prices didn't suit the way of the marketplace.

At the time and in those years, the railroads were
2487 the chief consumer of coal in this country. They
consumed one-third of the annual national production.

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A. At the time the railroads were buying one-third of the national production of coal, and were the biggest customer. They consumed it in their steam locomotives and transported freight and passengers throughout the country.

Sixteen per cent went into private homes, domiciles and mercantile establishments. Other percentages were used in the chemical industry, in the coke industry to a degree.

We used to have annual appreciations when certain markets were tapped. In late June and July, the harvest would cause an appreciation of coal sales and provide more work for the miners, because all threshing machines, throughout
the country were coal burning and people looked
2488 forward to the time when the harvest came.

In the fall of the year, schoolhouses came, because the schoolhouses throughout the nation, some of them far remote from settlements, had to be filled up with coal for the winter, most especially in those areas where the climatic conditions would make it difficult to transport coal in the wintertime.

Then we had the lake trade that took coal up in the summertime to the northern provinces of Canada and our own areas up there.

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That is changed. The railroads went to diesels; the schoolhouses were consolidated, had central heating, generally with oil or gas; and the little red schoolhouse far out in the country that used to have a stove and the scholars would carry the coal in and the school teacher would build a fire in the morning, the coal house is gone, but there is a butane tank there, gives them heat out of a gas tank made from a petroleum base. So that is gone.

So constantly the coal industry has had to change the basis of its hope for business. In recent years, one of the great things has been in the increase in the usage of electric power, and the fact that within the distance of reasonable transport, coal will produce power more cheaply than oil or gas, and much more cheaply than water power when one considers the original investment in water power.

2489 Only the government can develop water power projects such as the TVA, because a private investor couldn't make a return on the vast investment required for the costly constructions of dams and retaining areas for water. Very rarely has any of those projects been finished in this country except under government aegis.

Now the industry is growing, and the electric power industry is the largest consumer of coal now. We think that research is coming into its own, and for the first time the government has charted a course now in cooperation with the mining industry for exhaustive future studies of the chemical resources of coal, and what can be liquified and segregated.

I am sure counsel knows that contained in our coal measures are all of the organic values of ends of time that can be compressed into this storehouse represented by our coal seams, and everything of organic value that the world developed or created during those periods when coal was formed is contained and locked up in the chunks of coal that we bring out of the ground.

We already know how to eliminate — how to take out

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thousands of products. Some I think can be taken out competitively. Others cannot be taken out competitively, and we know there are other thousands of sub-divisions rests upon our genius and our technique and our educational potentials to isolate those values and make them of value to the current world who are given them by nature and providence.

So the Mine Workers never opposed the introduction of machines, because they believed that it was inherently necessary to preserve free enterprise and our concept of the freedoms inherent in the American form of government.

Right now free enterprise is on trial all over this world by more absolute forms of government, with power to commandeer the services of men under any conditions they describe, and for as little as they may elect to provide, and we have these expanding populations that are going to flow over the boundaries of these political subdivisions of the earth in great lands to the tune of millions of people, because they are asking also for bread and participation and some of the liberties inherent in the concept of government we have here in our home country.

The Communist threat that blooms on the horizon and occupies the daily attention of every citizen of this land, what about it? They are increasing their production by commandeering the brains and the hands and the strength of the population that is a multitude, and there is visible what some of the things they are doing.

2491 Three years ago, I addressed the American Mining Congress in Cincinnati, in June, and I told them that at the end of that year, Russia would exceed in gross value the coal production of the United States, and it did. It did.

What are they doing with that coal? They are putting it into the Mediterranean and driving out American coal; they are putting it into the Baltic countries and driving out American coal; they are putting it into the continent.

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The Polish mines under their direction are turning out increased volumes of coal at prices that will shove the American exports out of those countries. They are driving us out of our consuming areas in South America for coal, the Argentine and the other countries down there, so who is the man who can say that we don't need to lower our cost of production in the United States, that the machines displaced manpower in the mines, and therefore is a curse?

He is the man whether he understands it or not, who is advocating that America not improve its technical processes and wait to be overwhelmed by the gigantic quantities of goods which other nations at lower wages and under abominable conditions and under dictatorship will dump into the world market to the entire exclusion of the free enterprise economy.

There is more at stake in this proposition than the welfare of one coal company or any group of coal companies.

We are a free enterprise nation. We are dedicated to the principle of retaining competition in our free enterprise institutions. And to say that we can live in this advancing world and find employment and participation for the 220,000,000 estimated population we will have in 1975 is just an absurdity. And unless we can find jobs and participation for this million-and-a-half or so of young people who come into the work employment market every year with their professional educations and their vocational educations and their training, representing great sacrifice upon the part of the families and the students to seek that, unless we can provide employment for them it is not a reason to expect that they will long remain proponents of free enterprise that don't permit them to enter and participate.

That is the problem of America and the coal industry can't be too proficient because progress is going on and we have a scientific renaissance in America and in the

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world today and no one can predict the invention of tomorrow, so we have not opposed the mine machine.

We have sought to make advantages out of it and a participation in its elements of virtue on the part of the people we represent. And let me tell you in doing so it has been to the advantage of the coal consuming public of the United States because the price of coal at 2493 the mine today in the United States is from 40 to 65 cents per ton less than it was in 1950 or 1948.

Q. Due to what? A. Due to improved efficiency in the production of coal and the taking of it from the ground, and to the manner of its preparation that removes the impurities and makes it burn.

Q. Mr. Lewis, let me stop you just a moment and take up on a similar line but a little different approach.

Can you give us some idea of the difference in proficiency or efficiency of coal production per man, take tons per hour or tons per day, today as it was at the end of World War I, beginning of World War II and the end of World War II?

A. Well, after eleven years — no, probably 14 years — of nationalization of the coal mines in Great Britain by an Act of Parliament, they are nationalized, the government operates them —

Q. The government took them over in Great Britain? A. Yes. First they took over the coal mines and then later they took over the operating companies, made it a complete nationalization, and after all those years of experimentation they have got the coal produced per man day in Great Britain up to 1.23 tons per day per man.

On the continent it is somewhat less. The last set 2494 of figures I remember was .83 ton per man employed per day in Belgium and in France and Austria.

In Japan their production per man per year employed in their mines is equal to the tonnage produced in one of our coal mines in 18 days by an American miner. The

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American miner produces a value in 18 days amounting to the entire value of a year's work of Japanese miners.

In India, at its greatest open surface mine, which is the greatest of all their mines, it produces 10,000 tons a day and it only required 16,000 employees per day to do it, working three shifts, around the clock, 10,000 tons, 16,000 employees. The average wage for the men is 37 cents a day.

Q. How much? A. Thirty-seven cents a day. The earth is removed by women carrying the earth in baskets on their head. Some of the women clean the small particles but small children pick the particles of dirt and scrubble out of the coal. Men, women and children work in that mine around the clock, three shifts, 16,000 in number, getting 10,000 tons.

Q. We want to finish this before we have to recess. Now bring us down to the United States. A. Twelve tons per man day as I speak to you, the average of all the mines in the United States, and that average is depressed by the fact that in that average there are several thousand small or inefficiently equipped mines that produce a much lesser tonnage, so it depresses the national average.

We have mines right now that are producing 28, 30 and 40 tons per man day — not the average. The average is 12. That includes every little mine that produces coal that is reportable.

In World War I the average produced was three tons per man day.

Q. In the United States? A. In the United States. And in World War II there was an average of six tons per man day, but in World War II they produced 125,000,000 tons more coal in the maximum year of our production with 300,000 less men. The Armed Forces — the United Mine Workers had 178,000 of its men in the Armed Forces.

That is the record of efficiency, and since World War I the increase has gone up from an average — since World

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War II, from an average of six tons at that time until the national average of 12 tons right now.

That is the reason we are able to put our coal down in Germany and in continental areas in Europe at as high as two and three dollars a ton cheaper than that country can produce it in its own mines with its own nationals.

2496 Germany has barred us out except for a limited tonnage. They put up a roadblock against our imports. They have got a tariff against American coal of \$4.78 a ton. I think that is right. I am quoting from memory but I think that is the accurate figures.

They can't compete with us in the field of economics so they erect this import barrier and only against American coal — not against anybody else's coal.

Those are the things that are happening and all these questions run to the future of America and the stability of its economic establishment, and a sick industry can't exist in the United States with impunity because it affects other industry and under the modern integration and complexity of our economic system if the coal industry is depressed, or the steel industry is depressed, every major industry will likewise feel the effects of their misfortune.

2497 Q. And now in conclusion — it is 12 o'clock — but without mechanization as it exists in the mining industry today, it would be a hopeless industry in America, would it not? A. Quite so, sir. Quite so. I don't see how they could ever get — well, in the first place, the economy wouldn't have advanced currently like what we have now.

2498 Q. Mr. Lewis, are you familiar with the Walsh-Healey Act and its enactment by Congress? A. Yes, sir.

Q. Did the United Mine Workers and you as president of the United Mine Workers advocate the enactment of that statute? A. Yes.

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Q. Why? A. Because it created an American standard of employment level and living conditions and, in effect, a minimum wage in those industries that supplied the government with the various commodities, and became in the intent of Congress the American standard, below which wages shouldn't be paid, entering into the field of pauper labor and sweatshop production. We favored that as an act of general policy to increase the living standards of Americans, increase their buying power, give them
2499 a greater participation in the value of their services and the work of the government. We favored it in principle.

Q. In connection with the carrying out of the provisions of the Walsh-Healey Act, I believe the Secretary of Labor of the federal government conducted certain hearings, did he not? A. That is right.

Q. Did the United Mine Workers of America participate in those hearings insofar as they affected the production and sale of coal, or the sale of coal? A. Yes, in cooperation with the hearings and the Secretary of Labor, in securing the establishment of the recognized Walsh-Healey base in the coal industry in which given concerns spend tax money, the TVA among others.

Q. And under a finding by the Secretary of Labor, there is an established prevailing wage for the commodity in a given area, is there not? A. That is right.

Q. And people selling that commodity to an agency of the federal government, in order to get awards or contracts with the federal government, must comply with that
2500 prevailing wage? A. That is right, in all contracts exceeding in value of \$10,000.

Q. Now in connection with the Walsh-Healey Act and the TVA; did you have and the United Mine Workers have any connection with TVA in connection with the enforcement of the Walsh-Healey Act? A. We have at times had representatives confer with the officials of TVA urging them as

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an establishment operated on tax money to patronize those concerns that paid the American standard of wages as defined by Congress, not with respect to any individual buyer, not with respect to whether the United Mine Workers of America had contracts with those interests. It was immaterial. We wanted to protect the American standard of wages. And to go on from there and improve as circumstances would permit and our influence bring about. That is all.

Q. In other words, to urge that TVA comply with the requirements of Walsh-Healey in the award of contracts?

A. Yes. TVA had a practice of buying from exploited industries or debased industries or substandard industries in lots of less than \$10,000 so as to escape the provisions of the act. They would give multiple contracts of that kind, so sometimes they would sell the TVA 50,000 tons, or 100,000 tons by having a series of less than \$10,000 value contracts. We protested that as a subterfuge and not good faith compliance with the statute enacted by the 2501 Congress.

Q. And in that connection you never made any protest, did you, whether the coal purchased was from a union mine or from a non-union mine? A. Never at any time. Nor with respect to any particular or specific coal company in the industry.

Q. In that connection, was there any effort made to put any small or large mine or any other mine operator out of business? A. Never at any time and was furthermore from our intent or our thoughts.

Q. Mr. Lewis, has the United Mine Workers of America at any time joined with or agreed with any coal operator, made any agreement with any coal operator to influence either pricing or operation of mines for the purpose of any putting any operator out of business? A. Never in the entire history of the union as I know it.

Q. Have you ever been a party to any agreement with

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reference to the pricing of coal? A. I have not, neither in an individual capacity nor an official capacity as representative of the union, nor other labor organizations when I was representing other labor organizations.

Q. Or with any capitalist group or financial group? A.
With no capitalist and no vagabond.

2502

CROSS EXAMINATION

By Mr. Rowntree:

Q. I believe it has been your position or your statement that fewer and fewer units of production will take over the production of coal in this country? A. Due not to any action of the United Mine Workers of coal industry, but the trend of the American economy under the free enterprise system in competition with all the other producing countries of the world, yes, and I embellished that reference by giving some of the reasons for it, as I recall it.

Q. And I believe it is your statement that these combines that are being formed through mergers in
2503-2504 the coal production industry are able to make tremendous savings in their operating costs through — A. Not —

Q. Just a moment, please. Through mechanization, through term contracts with the coal market and other things, savings of costs that are not available to the smaller companies. A. Those combines to which I do not refer with the qualifying language that you use, I say that it is a matter of common knowledge that a larger company in our competitive world, producing any commodity of national usage, certainly can make some saving by having a larger volume of production, or if combining a number of units of productivity in that particular field. Certainly it is recognized that a large company needs to spend less money for sales cost for larger volumes of coal. The same is true on management. The same is true

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on the purchase of supplies. The same is true in regard to managerial responsibilities and preoccupation. That is attested to in every industry in the country by the law that exists there in competition with lesser units of capital that are invested in that industry, and it is common practice thinking, merely a recognition of the trend of the economy, for the reasons that are understandable.

2505 Q. And the same is true with respect to investment of millions of dollars in mechanization, the employment of one hundred yard stripping shovels, the use of continuous mining machines? A. United Mine Workers have no restraint on how large a piece of equipment should be, or what its capacity may be. There is constantly experimentation and research in the field of manufacturing by the equipment manufacturing companies in this country, and it is like our present-day maritime fleet, bears no resemblance to the maritime fleet of World War I.

The Liberty ships are obsolete in this modern age, and they can't compete on the high seas with the improved units, faster and greater capacity, with less overhead, a quicker turn-around, all of those things having to do with the cost per unit that they deal with.

Q. And so these large combines are able to make a savings in cost? A. I do not know what you refer to as large combines.

Q. Well, we will go back to that right now. A. But it is obvious if a man has a department managing his mine and his sales organization selling coal, that it is conceivable that both departments can account for more tonnage if they had it in the market and could sell their coal
2506 at a price sufficiently low to attract buyers in the market. Those things are axiomatic and fundamental and plain "abc" in the management of modern industry.

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2507 Now, Mr. Lewis, you have brought into this case this struggle between Communism and the free enterprise system, and I should like to review that question from our standpoint.

Is it not true that the backbone of the free enterprise system is equality of opportunity? A. You may have that viewpoint. At the moment, I am a little cloudy how to fit it into the complex economy and the interdependence of our economic units upon each other.

Q. All right, sir. I think the record is clear that the United Mine Workers have one contract, one contract for all companies, large or small, regardless of working conditions, regardless of finances, regardless of ability to pay, is that not right? A. That has been the policy of the union through the years, but not achieved in its entirety, and while we like to negotiate contracts similar in nature on the theory that equal service or specially skilled service in a coal mine is worth just as much to the individual in Tennessee as it is in Pennsylvania, we hold that the mine worker in Tennessee is entitled to the same wages for the same work and service performed underground or above ground as the case may be. However, we have not been able to achieve that goal in its entirety, although it has been a policy of the organization for many many years, 2508 it's only in certain areas that we have achieved that, and we have many contracts that do not equal all of the provisions of the National Bituminous Coal contracts. There's differential still in increasing the —

Q. It is true that the increases since 1950 have been uniform throughout the country for all companies? A. No, I think — no, I think there are certain differentials inherently — the wage increases are applied uniformly.

Q. That is what I asked. But the basic features that previously existed, different yardage rate, different car rates, different day rates for the same classifications.

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2509 Q. Now these men in Tennessee are entitled to work on an equal opportunity basis with the miners of the large companies, are they not? A. Are you talking, sir, from the basis of equity?

Q. I am talking — A. Or economic circumstances and the limitations that places upon negotiating parties?

Q. I am talking about fundamental rights under our free enterprise system, that men should have the equal opportunity to work all over this country. A. No, I think that is a generally recognized principle.

Q. All right, sir. A. Accepted abstractly and academically by the population, and yet all is not existent locally and in communities and areas.

Q. And another important aspect of this struggle that you have mentioned that exists in the world today is the extent of unemployment in our country. Don't you think that the unemployment factor is an important item in this struggle with Communism? A. I never knew the time in my life when I didn't believe that, that the opportunity for employment is very, very important.

2510 Q. Yes, sir. Now with respect to this business of the coal industry being organized into fewer and fewer units and larger and larger combines, I take it that there you are talking about large companies organized with the United Mine Worker contracts, that is your picture, is it not? A. No, I do not agree with you on your analysis of that subject.

Q. Do you expect the United Mine Workers of America will not maintain its position as the bargaining representative in these large Mines? A. I expect that the United Mine Workers of America will continue to protect the interest of its members in the future as it has in the past, but without assuming responsibility for determining whether there should be a merger of coal companies, or what you prefer to allude to as a combine, or whether there shouldn't be, and as to the identity of the party, that is a field in which

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the United Mine Workers of America does not operate for the reasons I advanced in the hearing on direct testimony this morning.

2511 Q. Now with respect to these large organized companies I would like to examine the leadership that would be in control in this struggle that exists in the world which seems to have been a factor in your direct examination.

The United Mine Workers in World War II, what kind of record did they have? A. You mean a war record, or economic record, or patriotic record? What do you mean?

Q. I mean record on strikes. A. Record of what?

Q. Strikes? A. Strikes?

Q. Yes, sir. A. Our proud record is that despite all the aggravations and the impositions imposed on the members of the United Mine Workers in World War II that we kept the wheels of industry running. The war effort was never impaired. We produced all the coal that our organized domestic commodity could consume without impairment. We produced all the coal that our allies could not produce to sustain them in their war effort.

And I call attention to the fact that for a long period of time the Mine Workers of America agreed to work six days a week, nine hours a day underground, to furnish coal for our British allies who were working five
2512 days a week, eight hours underground, and the rest of the world accordingly.

Q. And how many times did the Government have to seize the coal industry to keep the mines going? A. Four times, as I recall.

Q. Four times during — A. Not during the war, however. That was in the period of the 1940s.

Q. Well, the war was from 1941 to 1955. A. That seizure, if I may add —

Q. I mean, 1945. A. — was the seizure of the operators'

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coal mines. The Government did not seize anything that belonged to the United Mine Workers.

Q. Why did the Government seize the mines? A. Because the operators were so woefully inadequate in the handling of — in the negotiation of their contracts and ignored the rights and the hope of the coal miners who were making this terrific effort to uphold the government, that the Government took their mines away from them and made the contracts themselves, as witness my testimony this morning.

Q. I believe there was a seizure — A. Then in order, may I add this — that the operators were anxious to get their mines back from the Government, to whom 2513 they had given them, that they were compelled to agree to the terms of the agreement negotiated by the government with the United Mine Workers of America.

Q. I believe the first seizure was in 1943, is that right, and I will read from this statement which the Union made, and this is already in the record, just to refresh your recollection. 1956, page 82.

The 1943 seizure. This seizure lasted for five months and twelve days from May 1, 1943 to October 12, 1943.

Twenty days later, on November 1, 1943, the industry, was seized again. This seizure lasted for six months from November 1, 1943, to May 31, 1944. This seizure was not terminated in the southern producing area until June 21, 1944.

There was a third seizure of certain coal mines that became involved in supervisory strikes during September and October, 1944.

There was a fourth seizure, involving certain mines from April 10, 1945, until June 3, 1945.

Do you recall those seizures?

A. Oh, yes, I recall them as an abstract proposition although the details of them are somewhat dimmed in my

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mind due to the passage of years.

2514 Q. Now, Mr. Lewis, in this world struggle that you have mentioned, let's examine the management side with respect to these great combines, fewer and fewer in number, that are to take over the coal industry.

"I believe that you have selected Mr. Cyrus Eaton as the manager to whom you have loaned some—loaned or invested in his companies some \$40,000,000; is that correct?

A. I would not know the exact amount but certainly we have engaged in a business arrangement with Mr. Eaton as effected West Kentucky Coal Company.

Q. And would you say that Mr. Cyrus Eaton is a man to control these great combines in this world struggle against communism? A. I don't know anything about any great combines. There are some great combines I know of, like the American Telegraph and Telephone; the big companies in the steel industry. But I don't call a merger of two or three companies a great combine because none of them are very great in relation to the total tonnage of coal mined in this country and the future prospects for increased tonnage necessary to meet the requirements of our increased population.

Q. We are talking about a tendency—a tendency to combine into fewer and fewer units. It may be just getting started, but still we are talking about a tendency, 2515 and I will ask you if Mr. Eaton is the kind of man we want to lead and control a basic industry like coal in this world struggle? A. Why, sir, I have no knowledge of what is in your mind, and I think—I assume you are including yourself in the first person plural "we" there.

Q. Yes, sir. A. But I don't think Mr. Eaton's political opinions, pro or con, as to whether he is for war or against war, have anything to do with economics of this coal industry and certainly has never been given any consideration by the representatives of the United Mine Workers.

Q. So the world struggle is really not in question here?

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A. I do not so concede. I maintain now, as I have previously uttered, that free enterprise, as we know it, is under heavy assault from the commodities being produced in at least three countries including the communist bloc. And that if we are to compete in the world of commerce with this gigantic group of people over whom the flag of Russia flies with their skillful adaptation of the modern sciences to improve their production and make advances in the scientific world, some of which we have not yet approached ourselves, that we have to compete with them; that we have to make free enterprise more efficient; that we have to expand our economy at a faster rate than it has been expanding in order to provide a participation and job opportunity for the young people we are turning out of our schools and universities year by year in increasing numbers.

Certainly there is a grave question of the effect upon youthful minds of not being permitted to participate in the blessings and the privileges of the Land of The Free and Home of the Brave. Those are matters of concern and those are the questions to which I alluded in talking about the communist menace, and it is not only recently I am talking about that because the United Mine Workers of America petitioned Congress in 1924 to investigate the communist propaganda in this country when the rest of the country had scarcely heard of the question. It is all of record and for all to read.

2517 Q. And the United Mine Workers was one of the two major unions in this country that refused to subscribe to the anti-Communist affidavits? A. That is right, sir. That is right. And they maintained that position until Congress altered the law and the statute on that question. So we must have been right.

Q. They require reports? A. I assume we were right if Congress found that it was wrong.

Q. And Congress at the same time required unions to fill reports of the internal organization? A. Congress never

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enacted any law that required us to take the anti-Communist oath. It is a privilege that Congress gave.

Q. But it required the union in 1959 to file its report with respect to its internal organization and finances and the union had never done it before that time? A. Perhaps if the technicians and lawyers so advised, that is what we did.

2519 Q. I would like to talk about checks and balances. Mr. Lewis, our democratic, our republican, institutions are founded upon a system of checks and balances, 2520 is that not correct? A. I do not know your premise or what you are going to say.

Q. Look at the constitution. A. I can't affirm or deny your premise until I know what it is. What do you mean by checks and balances, if I may be permitted to ask?

Q. Look at the constitution. A. The constitution of the United Mine Workers?

Q. No, the United States. A. That is clear now.

Q. We have a system of checks and balances, do we not? Yes, we do, don't we? A. Your question.

Q. We have a system of checks and balances, not talking about checking account at the bank, I am talking about checks and balances, the system of running things. A. If you want to call—if you wish to refer to the subdivisions of government as between the executive department of government, the legislative branch of government and the judicial branch of government, then of course the constitution provides what you allude to, I suppose, as checks and balances. That is obvious, as any school boy is familiar with those things.

2521 Q. All right, sir. And in business and in industry, there are also checks and balances under our economic laws? For instance, we have the anti-trust law, with respect to monopolization, and at the same time our law recognizes a business or a man's right to get ahead by enterprise and initiative. There are checks and balances in your economic laws, is that not right? A. Well, one

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could call them diminutive checks and balances as they pertain to the operation of a factory or an industry, but they are minor in consideration to the checks and balances that are inherent in our constitution as affecting the stability and the future of this form of government. It has no relation to them.

Q. No, but I am talking about systems of checks and balances. A. In the light of experience, these so-called checks and balances in industry are quite feeble and not operative.

Q. All right. A. Just like some of the provisions by statute are not operative in certain areas.

Q. That is why in this area of economic law, that is why suddenly there merges a great giant enterprise that has monopolize the field and that is why the government then has to then go after it? A. Well, may I say to distinguished counsel, that I am trying awfully hard to be responsive to what I think your questions are.

Q. I realize that. A. But at times I am bewildered to know whether you are testifying or whether I am. Are you testifying about certain types of checks and balances that you want to portray the equities and beauty of it this afternoon and then get my reply, affirmative or negative, as to which side I am on?

Q. No, sir, Mr. Lewis. We have been through this before. I am just asking you a question there. If we don't have checks and balances as a means of running government, as a means of carrying on our free enterprise system. A. Well, I am not sure that you and I agree on what a check may be or a balance may be, and that becomes an abstract discussion.

Q. Well — A. Where the law of supply and demand —

Q. Let's turn to the traditional management-labor relations field, and there are checks and balances in that field, too, aren't there, protecting the rights of management on the one hand and protecting the rights of labor, the employees, on the other hand? Isn't that right? A. I think that every individual has a check by his own inherent limita-

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tions. He may be able to sustain a viewpoint at some
2523 loss to himself and some sacrifice to his family for
a limited length of time, but not indefinitely. The
same way with miners and operators. When the operators
are afraid the government will seize the mine, the govern-
ment took their mines and operated them to the account of
the government. Then they made an agreement with the
people and representatives that the operators refused to
agree with. Then they asked for their mines back.

Well, they were in position of wanting to negotiate, but
they didn't have mines upon which to negotiate. And all
the mine workers had to do was wait until they got into a
mood of accepting the basis of settlement which the govern-
ment of the United States, with the approval of the presi-
dent and with the consent of the Congress, had approved.

Q. Let's go to — A. Now they were checked and
2524 limited and balanced to death there, weren't they?

Q. Let's get over here on this check and balance
with respect to employer and employee. Now the employ-
ees look to their union to take care of their rights in an or-
ganized business, isn't that right? A. Well, I have been
under that assumption.

Q. Now isn't the most basic need of an employee, the need
to have a job so that he can make a living to support his
family, survive, isn't that right? A. I think it is elementary.

Q. All right. A. There's about seven million of them now
in the same position now in the country.

Q. And the United Mine Workers diligently pursued the
rights of the employees in the coal industry until 1950, did
they not? A. Until this date.

Q. All right. A. Until this date.

Q. And until 1950, you maintained that there should be
equal opportunity to work among the coal miners of the
country? A. We have always maintained the same posi-
2525 tion, and the principles and the objectives were writ-
ten and defined long ago, and there has been no de-
parture by the United Mine Workers from those prin-

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ciples and those policies on the date you seef enamored by, 1950, or any other date that you might dig up in the calendar. I would prefer you to use the Gregorian calendar.

Q. But in 1948, 1949, and early 1950, you were urging the industry to spread the work, to equalize the work opportunities, to reduce the working time to three days a week. In spite of the great, tremendous investments that these companies had and these modern mechanized mines, you were urging them to cut down on their working time to three days a week and spread the work throughout the industry, to all the employees, pursuing the basic right of employees everywhere to work. Isn't that true? A. It pains me greatly to disagree with the nice speech of the counsel, but the answer to all of your accusations in that short narration is no, you are wrong, we did not urge the stablishment of a three-day week in this country, neither then, before, or since.

However, it was alleged in the public press, ofttimes by the utterance of opinions of men of little knowledge on the subject, that there was going to be an immediate shortage of coal and a crises in the country if the strike wasn't settled.

2526 Q. You are talking about the negotiations in the 19--

A. The Mine Workers knew there was no coal shortage, that every facility of the nation was going to run, that there was nobody without coal, because we had a very substantial knowledge of exactly how many tons of coal were above the ground in the United States of America, where it was stored, who owned it, and its availability for usage. That is our business to know those things.

So, in order to quiet, suppress the headlines in the newspaper and detract somewhat from the efficiency of the public orators on this question, and some of our major politicians who sought to make political capital out of berating the United Mine Workers of America, we offered, pending

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negotiations, and pending the final completion of a
2527 new contract, to let the mine work three days a
week.

Q. And you say that that is — A. That was a stipulation that we put on merely to abate that uproar and at the same time preserve some of our bargaining rights with the operators so as to finally limit the period of negotiations, rather —

Q. You say that is all this three-day work week was? A. That is all the three-day work week was.

Q. All right, sir. A. And let me say to you, sir, what I have already put on this record, so there will be no misunderstanding about it. The United Mine Workers of America could not have been persuaded to accept a three-day week, and if it was offered to us, we would have rejected it then and now, because it limits too much the earning powers of our membership, and we think it is an idle, useless thing, to require a man to live around a coal mine for the opportunity of working three days a week and being idle four days a week.

Q. Mr. Lewis, isn't this testimony directly contrary to what you testified in your deposition? A. No, I did not.

Q. All right, on page 68 of your deposition, I refer you to this statement that you made in 1948 before these negotiations over the 1950 contract.

2528 "Quote: 'So next year in 1949 or at any other time when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days work in this industry, we will all have the three days work. These things are of the utmost importance. Conditions are not now as they were in the old days.'

* * *

"Do you recall this statement?

"Answer: Oh, yes, and I may say that those observations merely relate to one thing: The equitable distribu-

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tion of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed. It had nothing to do with any other subject."

Now isn't that the correct testimony on this question? A. Well, I reaffirmed those words now.

Q. Well, Mr. Lewis — A. And I point out, which you seemingly are unfortunate that you are not familiar with all the technical details of the coal industry and it is a reasonably assumption that I am —

Q. I will admit readily that I am not. A. But the rule was that when demand fell off, certain companies
2529 having more than one mine, or perhaps a group of mines, would completely shut down one mine and leave those men idle, concentrate their tonnage — they may shut down two mines or three mines, before it is over, or four mines, to concentrate their production to fewer mines and giving a certain part of the employees of that company steady, every-day employment, while the rest of their employees were cut off from any employment whatsoever.

Q. Sure, that is exactly what I am talking about. A. It relates to the equitable distribution of the available work, and not as a limitation to production to a three-day week.

Q. Well, I am not talking about the limitation of
2530 production. I am talking about the union pursuing the fights of the men to an equitable distribution of the work, looking about the interest of the employees in all the mines of the country. A. It still recurs, counselor, that ancient observation you have just pointed out there, has no relation to the three-day work week in principal that you were discussing previous to reading it.

Q. You are talking about the three-day work week in there. A. It just happened to be used there as a symbol, what the work might have been produced under certain circumstances. You have got to start somewhere in the week and it is in the middle of the week.

Q. And the next question:

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"And in 1949 and 1950, during the period that negotiations for the 1950 contract were going on, you did set three day work weeks and other types of work weeks in the industry?"

Answer: "We set a three-day work week, yes, to distribute the work and the opportunity for work; and for no other reason."

A. You mean that was a three-day arrangement made a qualification to bargaining?

2531 Q. Yes, sir. A. Well, they would not have worked three days if there had not been market enough to take the three days. That was used as a yardstick there and had no relation to the things that seemingly you have in your mind that there was a conspiracy to which we were a part that was designed to reek evil or disadvantage on other companies not under contract with the United Mine Workers of America. That is not true now and never has been true.

Q. I am not talking about that right now. I am talking about your purposes, your motives, your position taken before the 1950 contract. And this testimony that I have read from, that is correct, is it not, Mr. Lewis? A. To what do you allude? Do you mean the transcript of the deposition?

Q. Deposition; that is right. A. Anything in that transcript certainly is verified.

Q. All right, sir. Now — A. You will find nothing in that transcript, counselor, that undoes or conflicts in interpretation with any expression that I have voiced here today in this Honorable court, and all attempts to confuse me by comparison of words will undoubtedly not confuse me.

Q. Mr. Lewis, this was an important item. You
2532 came in today and testified that this three-day work week was a problem of just satisfying Government authorities, or some authority, or the people, with respect to the shortage of coal that was going on during the course of these negotiations because of the strike, and now I bring

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up — A. I disagree heartily with your conclusion that is all that it was.

Q. Just a moment. I bring up — A. Your understanding of these terms and mine are apparently somewhat dissimilar. I am talking from my knowledge of the industry. I assume you are talking from an abstract knowledge of it and a superficial indoctrination of some of these terms in question.

Q. I am not trying to be — what term did you use? I am not trying to indoctrinate anything. I am trying to figure out what happened in 1950, Mr. Lewis, and I say that this testimony you gave in your deposition is true.

Isn't it true, Mr. Lewis, with respect to the three-day work week and the limitation on the working time in the industry, to distribute the work? A. Sir, with all deference I have tried to explain in layman's language that the three-day work week suggested for a limited time pending negotiations made on that day and date and during that period to which you allude, was merely a piece of bargaining strategy to place our opponents at a disadvantage.

2533 Q. And you reject now your testimony — A. And it is a technique sometimes used by distinguished attorneys in the profession, as I have cause to know.

Q. And you say now that you did not mean what you said back in 1948? A. No, I do not so say, sir, and I don't take kind to your constantly trying to put words in my mouth.

Q. Well, I was reading from your deposition, Mr. Lewis. A. Yes, but you were interpreting the deposition in a manner that I thought was inaccurate.

Q. I was reading it, Mr. Lewis, and comparing it with what you testified here today about the supplying of coal for a shortage that existed during those negotiations as being the only thing you had in mind about a three-day work week.

* * * * *

2534 Q. Now, Mr. Lewis, since 1950 the union has imposed this contract on all the small mines of the country and the union has known that these small mines

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could not pay these union terms, isn't that right? A. No. It has never imposed a contract on anyone it has bargained collectively with who is not a signatory of the industry contract, and it is not true that while doing so we were aware that they could not meet the provisions of the contract.

That is an assumption entirely erroneous on the part of counsel, and I dislike to have words of that character put in my mouth.

Q. All right, Mr. Lewis. You have tried to sign up every mine in the country, haven't you, under the contract? A. When?

Q. Since 1950. You started an international organizing committee in 1950, did you not? A. We probably had the work in our organizing facilities then as in the time before, and the time since.

Q. Well, there was an international organizing committee established by the International Union in 1950 2535 after the contract of 1950? A. I do not know what you mean by "international organizing committee," and I don't recall that verbage but if you mean that was their renewed emphasis on organizing, yes, because the United Mine Workers did not have to engage in a long struggle and it had finances free therefore to pursue its regular organizing work.

Q. I read from the 1952 minutes, page 267:

"In October, 1950, an international organizing committee was set up by the International Executive Board to promote an intensified and integrated organizing campaign in the non-union areas of the bituminous coal industry."

That is correct, isn't it? A. The Board may have authorized renewed emphasis or renewed organization of the constant organizing effort at that time, but it did not mean any departure from recognized policies that had been more or less in effect all the time depending again on our resources to sustain their effort.

Q. But you did not put such emphasis on organizing efforts or set up that organizing committee until October,

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1950? A. Probably did not have any funds, that we had our resources free. You will remember in the 1940's practically, '50, we frequently had our funds tied up by injunctions and court procedure.

2536 Q. Why was that? A. And harrassment generally speaking, from all quarters, both governmental and private.

Q. Particularly the large coal operators, right? A. Particularly the large coal operators withheld our funds, yes, including the funds of the Welfare Fund.

Q. And you haven't had any trouble like that since 1950, have you? A. Merely because there wasn't any controversy —

Q. That is right. A. — that broke out into a stoppage of employment.

Q. Now with respect to this organizing, Mr. Kennedy said in 1952, page 279:

"We have had very little difficulty in organizing large units, but we have extreme difficulty in organizing strip-pings where the workers are taken from the farms and small towns adjacent to the stripping operations, but we are making pretty good progress and we shall continue to do so until the banner of this organization flies over every mine and every strip pit in the United States and Canada."

That was the purpose, wasn't it, to impose this
2537 contract on every mine in the country? A. There are flowery phrases with which orders are given which remind me of a quotation from former President Lincoln when he said that "The day would come when the sun would shine upon no man in this country who goes forth to unrequited toil."

That is the way orders are expressed, in sentiment. Those are the objectives, of course, the ultimate objective of any well-defined program but we do realize it is often interrupted and the objective is not reached as fast as might have been.

So certainly, Mr. Kennedy, if it was Mr. Kennedy, was

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making a speech to inspire our representatives of the necessity of going forth and achieving some success in the task of organization.

You will understand how vital new members are to a labor organization, or to the United Mine Workers, counselor, because there is a natural day by day decimation of the ranks, numerical ranks, of a labor union due to natural reasons that are inherent, and unless they can attract new members and new blood that organization is doomed to ultimate dissolution.

And the barrier is put in the way of organizing effort in some of our statutes which are now designed to lessen the efficiency of labor unions by making it more difficult
2538 for them to attract new members.

Those are practical facts to be taken under consideration, but a labor union must struggle on or it will die. You got to breathe life into the people, they have to be encouraged when they are discouraged or when they are oppressed or when their privileges are denied to them.

All of this was consistent and quite independent of any alleged conspiracy beginning in 1950 or any other time with the United Mine Workers with any co-conspirators anywhere in the United States — companies, corporations, individuals, private or otherwise.

Q. Mr. Lewis, can you give us — A. When I make that averment and you come back with a distortion of some word or some sentence in some ancient record, I get the feeling that we are just fighting a windmill. There is no reality in it.

Q. Mr. Lewis, — A. What this does, it means that any man, whether a man made an error in his speech or misquoted a word, or he was not gifted in the facility of choosing his word too well — lots of honest men who are not very articulate yet they are worthy men and they are fine citizens. They may be able to do something else with the gift God gave them and excel but in the art of talking they would not qualify as a lawyer or a representative of labor.

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I will include myself there to make that palpable.

2540 By Mr. Rowntree:

Q. Mr. Lewis, the president of District 19 is appointed by the international executive board, is that correct? A. That is right.

Q. And his salary is paid by the international executive board? A. It was. I think it still is.

Q. Is it not true that the president of District 19 employed organizers or field representatives to carry on the organizing work in the district? A. I assume so at times, yes.

Q. And Mr. Taylor Maddox and Mr. Ed Daniel were sent into the field by the district president to organize all the mines that were not organized at that time? A. Not authorized — to organize as many people as they could.

Q. That was their job? A. Presumptively, yes. Any special assignments, I don't know anything about that.

Q. These organizers would take caravans of cars
2541 out to these isolated mines with men in the cars, and the caravans, and proceed to organize these mines, is that right? A. I don't know of my own knowledge.

Q. That was their job? A. Their job was among other things, to service the union men with their business affairs, members of the union, and to bring in such new members as were possible in connection with their work. Primarily that is the job of all representatives of the United Mine Workers.

Q. Mr. Taylor Maddox has given his deposition in this case and he has related his job duties and he is in a position to know what his job duties were, I take it? A. I have no knowledge about Mr. Taylor Maddox or anybody else working in the field since I retired as president. I do not keep up with those things. I do not know whether he is now employed or otherwise of my own knowledge.

Q. I think you have recognized on the record, Mr. Lewis, that many of these "pale, undernourished mines" would

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not be able to pay the kind of terms in this contract, the National Bituminous Coal Wage Agreement, and using another expression, "the weak shall trail the strong til they fall"; these things are true, aren't they, that many mines could not pay this wage, this royalty of the welfare and that they would fall after they became assigned to 2542 the contract? A. I had no knowledge about any of

them as to the capacity to meet the obligations of an industry contract, except that they averred and promised to meet those obligations when they executed the contract and they assumed a moral and a legal obligation when they entered the contract, when they signed it, and that no one has any information about the assets or the reserves or the credit or the managerial ability of any mine of his own knowledge. That information is all known to the company, and to the company alone.

Q. But you knew the assets, the financial position, the abilities to pay of the major coal companies, I believe you have testified about that, haven't you? A. I don't recall major coal companies right now. An isolated special case? I don't recall it at the moment what significance it has.

Q. But your testimony was that the mine workers — Mr. Kramer: He asked you what case.

By Mr. Rowntree:

Q. This case here. This case here, you have testified that the mine workers were thoroughly familiar with the abilities, the financial standing and so forth of the major coal companies. A. But not the miscellaneous coal companies.

Q. That is right. A. And not the remote coal 2543 companies.

Q. That is right. A. And not the companies of which we had no knowledge at all.

Q. And the small coal companies? A. Well, naturally it would be included in the list of a lot of small companies in that category, but also a lot of large companies, family owned mines, of some sizable production, that suffer loss in assets and in credit every time there is a change in the

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family tenure of office and inheritance taxes impose another obligation on those companies. They oftentimes have insufficient credit to buy the modern equipment that they would like to buy, but they are hanging onto the corporation and the job as long as it lasts, until some day the sheriff will come along inevitably.

Q. These coal companies in that category were offered the same contract, the same contract terms as the large mechanical companies? -A. That is right. That is right. They were offered the same, the contract with the same wages, advances that took place elsewhere, but not the fundamental conditions that may have been previously negotiated in that district, and in some areas there is a differential existing, as I have heretofore said.

Q. But that differential doesn't help this part of 2544 the country here, the southern region No. 2? A. Well, that is an assumption on your part. I don't gainsay it if you think it.

Q. We have had the minimum wage list before us in this case under the Walsh-Healey, which followed closely the United Mine Workers contract wage, is that right?

Mr. Kramer:—Just a moment. It is not minimum wage. You don't mean that. Prevailing wage.

Mr. Rowntree: Prevailing wage.

Mr. Kramer: I have tried to avoid it. It is prevailing wage, which can be vastly different and will be before we get through the lawsuit.

Mr. Rowntree: I think both the witness and counsel have referred to it as minimum wage.

Mr. Kramer: I have tried to avoid it. It is prevailing wage, is what it should be.

By Mr. Rowntree:

Q. And Southern No. 2 is among the highest of those prevailing wages so-called, or are you familiar with it? A. I couldn't quote the figures right now, the difference on the prevailing wage in Tennessee as against any other area at the moment, without consulting the record.

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Q. These organizers in the field, with their caravans of cars, would not offer any lesser contract than the
 2545 terms contained in the national contract? A. They were not authorized to take any less wages than was the policy of the organization.

Q. And the union has been very successful in its organizing work under the international organizing committee, is that not so? A. I wouldn't say so, no.

Q. Well, what per cent of production has been organized under the contract? I believe you said one time 82 per cent as compared to 18. A. I think it would be around 80 per cent, 82 per cent, 83 and maybe back to 78 sometimes, due to the fluctuations of the demand for coal, the differences between period demands for coal. Roughly about 80 and 20 per cent.

2546 Q. When the companies, say the little companies in upper east Tennessee coal field, would sign the contract, the men in the mines would pay their dues to the union? I mean generally. A. Where?

Q. We make reference now to Exhibit 4, record book of defendant and cross plaintiff, referring to amounts paid out in 1955, May 12, to United Mine Workers of America, dues, initiation fee on men, \$126; June 4, 1955, same items, \$126; July 12, 1955, same items, \$126; August 8, 1955, same items, \$126. A good substantial part of those dues were going to the international union, I take it? A. Prorated, whatever the constitution required.

Q. And the union took these funds, did it not, and accumulated these funds together with funds of a lot of other small coal miners, company coal miners, and together with a lot of other funds that the union had and invested these funds in West Kentucky Coal Company in the latter part of 1955, is that not correct? A. No, I think that is entirely an assumption that is erroneous because the organization had funds available for investment at that

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period that didn't necessarily come from these small mines that you allude to.

2547 Q. These funds would go into the treasury of the union? A. They went into the common treasury of the union, yes, for the purposes held there in trust, for the purposes defined in the objectives of the organization and the constitutional privileges and obligations imposed on the officers.

Q. And the investment funds that were invested in West Kentucky Coal Company and the Nashville Coal Company came from the general treasury funds of the union? A. The general funds of the United Mine Workers that they had been able to build up through years of economy and careful management of trusts. No distinction between those funds after it had become the common property of all members.

Q. From time to time the international union imposed special assessments on the men, the members of the union, including the members in the small mines? A. Only after negotiation of substantial wages advances and the expenditure of larger than normal amounts of money in accomplishing that objective. Those assessments were modest in comparison with the amount of benefit the men were getting from the wage advances.

Q. These special assessment funds were likewise put into the general treasury of the United Mine Workers? A. Went into the general treasury and became the common property of all the members of the United Mine Workers of America in the United States and Canada.

Q. And were used for investment purposes from time to time? A. There was an obligation upon the trustees of the union to invest its funds prudently, secure what additional income was possible from their investment, the same obligation that rests upon all trustees acting in a fiduciary capacity.

Q. And these funds were invested in such companies as

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West Kentucky Coal Company and Nashville Coal Company? A. They were invested because we thought it would be in the interest of all the members of the United Mine Workers of America to so invest and we had no other principles and no other obligations except to use our judgment.

Now fiduciary agents sometimes exercise bad judgment. The membership always has to take a chance in any interest, corporation or fund; no matter what it is. Have to assume a certain hazard that their trustees will act with efficiency and intelligently. We have tried to do so.

Q. And in the latter part — A. We are convinced with respect to West Kentucky Coal Company it was entirely justifiable; has already brought substantial returns in employment and wages under this industry contract 2549 to thousands of men in west Kentucky.

Q. Do you know how many employees there were in the West Kentucky Coal Company in 1950? A. No, I do not, not from memory.

Q. Do you know how many there were in the year 1960? A. No, I do not.

2550 Q. Now, Mr. Eastin testified that there were three thousand employees in West Kentucky in 1950, and approximately 2,200 in 1960. Now, I would like for you to explain how the union has attained its objective in investing the funds if its objective was the employment of members of the union. A. By merely contrasting the annual wages, the daily wages of the men who remained employed in the mines with what they might have made before West Kentucky Coal Company signed the industry contract. West Kentucky Coal Company has been there for seventy-five years and the wages were always substandard, and the conditions of employment were always not up to the normal of the industry.

Q. Well, Mr. Lewis, Mr. Eastin also testified that the

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wage paid by West Kentucky Coal Company before it signed the contract with the union were equal to greater than the union rate, and that the welfare provisions of the company with its employees was equal to or greater than the welfare provisions under the union contract. A. That is possible at that time. Doesn't make any difference, because the West Kentucky Coal Company was probably afraid of unrest among their employees and they give them as little as they could that would content them. That is a device that is used by lots of companies in this country.

2551 Q. Well, as little as they could, does that characterize the terms contained in the National Bituminous Coal Wage Agreement? A. As little as they could?

Q. Yes, sir. A. We had no contract with them.

Q. Yes, but the testimony was that the company rate of pay was equal to or greater under the company before it signed the contract as it was afterwards. A. That don't make any difference with the merit of the proposition, because it is quite possible that they got it all back by increasing the company store prices in which the men were obligated to trade.

There are a lot of devices in the coal industry that employers utilized to exploit to the maximum their employees and get back all the amount of money they pay them for working in the mine: company store accounts, with them in charge of the prices, non-competitive, obligatory to trade there; rental of company houses, been amortized a dozen times at high rent; selling of coal; paying of electric lights; charges for water; the innumerable things that the company imposed upon employees they were free to do so and unrestricted by any collective bargaining contracts.

So those rates that you allude to mean nothing.

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Testimony of John L. Lewis

2554 By Mr. Rowntree:

Q. After the union invested these funds in the West Kentucky Coal Company and Nashville Coal Company, those companies have offered bids on the TVA market, particularly the spot market of TVA at low and dropping prices time after time with gigantic tonnages, isn't that right? A. I do not know of my own knowledge. I have no knowledge of any negotiations, coal contracts, conversations, sales, or rejection of bids of any character affecting the West Kentucky Coal Company, or any other coal company, until I receive the lettings of the TVA's which was published as to who received the contracts.

Q. And from — A. I do know from reading the public press that there are other companies there that furnish coal in greater volume to the TVA and were contracted for longer periods than has been reported publicly by TVA as affecting West Kentucky, but my own knowledge, I know nothing.

Q. While these coals were being put on the spot market by West Kentucky, were you not urging the TVA to eliminate the spot market?

2555 A. We were urging them not to defeat the purpose of Congress.

Q. And you were — A. By giving repetitious less than ten thousand dollar contracts, because we thought that was evasion and was not in accordance with the intent of Congress, and it enabled them to buy coal from brokers who acquired it from mines not recognizing the American standards as expressed by the Walsh-Healey Act.

Q. The Walsh-Healey Act expressly exempted from the minimum wage determination contracts for less than ten thousand dollars? A. And they were expressly exempted by Congress from the Walsh-Healey Act, Yes.

Q. Yes, sir. A. Contracts of less than ten thousand dollars. All right, Congress however, in our estimation, did

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not mean that the TVA Company, could just put a ten thousand dollar limit on all their contracts and continue repetitiously to buy it from the same people time after time, \$9,999.00 worth of contracts. That was not intended.

Q. You are not saying that Phillips Brothers Coal Company was doing that. A. I don't know anything about the Phillips Brothers Coal Company, and I never alluded to them.

Q. All right, and all companies were not doing that, were they? A. And you asked me what recommendations we made to the TVA.

Q. What recommendations did you — A. We urged them two things: not to practice evasion on the letting of the ten thousand dollars contracts, and defeat the intent of Congress; and secondly to buy coal from mines recognized by the Congress as paying the American standard, and not sweatshop coal.

Those were the two things that we recommended to TVA, and that is all, at any time, in any contract, or conference, with any representative of TVA with whom our representatives conferred.

Q. And you were urging the TVA to eliminate the spot coal market. A. No. It could buy all the spot coal they wanted as far as they could get it in the market, but we urged them to comply with the law as we understood it on the ten thousand dollar contracts.

2557 Q. And the law permitted tonnage which would amount to less than ten thousand dollars? A. It obviously permitted one, but there was nothing in it that would signify that it permitted twenty or fifty repetitious contracts of the same character with the same purveyor of coal.

Q. Would you not concede that the TVA market is a greatly depressed market with respect to price? A. No, only as the area is affected by low wages and the people's buying power is restricted by those low wages. That is all,

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and that is true in any section of the country where those conditions prevail.

Q. Well, what companies have gotten the big coal contracts with the TVA? A. I only have knowledge of those things by reading about the allotments.

Q. They are not — A. Peabody Coal Company, I understand, has far more tonnage scheduled and contracted for future delivery than anybody else in West Kentucky. What their terms are, I don't know; what their prices and bids are, I don't know; how many tons a year they are going to deliver, I don't know; but it is reported that it is for a long period of time, and that they have dedicated reserves —

2558 Q. And in West Kentucky — A. — to deliver that coal.

Q. And West Kentucky Coal Company is the other company that is getting the big contracts, isn't that true? A. Sir?

Q. And West Kentucky Coal Company is the other company that is getting the big contracts. A. Oh, undoubtedly. What proportion of the contracts they have, I do not know.

Q. And Peabody Coal Company and West Kentucky Coal Company work together in supplying coal markets, are you advised of that? A. You are saying that, I am not, because I do not know that to be true, and I have no reason to think it is true. I decline to indict anyone of a grievous offense merely because you assume that to be true and ask me to verify it.

Q. I am asking — A. I think that is rather an insult to my intelligence.

Q. I am sorry, Mr. Lewis, I am asking you if you know these things; or if you are advised of these things. A. I have answered on the record.

Q. All right, sir. One thing that was testified about on the last day of this trial was with respect to this
2559 meeting of the trustees with Judge Charles Dawson, and I would like to clarify the record on that.

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Mr. Val Mitch did not have minutes of that meeting, Mr. Lewis, or those two meetings. He said there was no meeting of the trustees, just an informal discussion. Do you have any recollection about that? A. Yes.

Q. Was there a called meeting of the trustees? A. It was a meeting for the informal purpose of discussing with Judge Dawson his position as to his right to become a trustee. It was called for that purpose, and it was not a formal meeting, and not a convened meeting, because we invited Judge Dawson into the trustees room, and the discussion was all informal and the meeting of the trustees was not assembled.

2560 Q. Well, isn't it true that these were called meetings?

A. They weren't called meetings. They were conferences with Judge Dawson.

Q. You had called the meetings, had you not? A. Quite possible that I had asked Senator Bridges whether he thought it was advisable for us to get together and give hearings to the judge. The judge was applying for a hearing.

Q. Do you recall the exchange of telegrams between you and Mr. Van Horne with respect to his resignation? A. Accepting it —

Q. With respect to his resignation. A. Perhaps so. I would not remember that now.

Q. And you sent a telegram on November 14, 1949 to Mr. Van Horne in which you asked him about whether or not he had resigned. Do you recall that you saw that? A. Very likely I was inquiring about the validity of his letter and how he interpreted his letter. I don't know now. That is quite a while ago and I don't carry those details in my head.

Q. The last sentence here is: "Do you confirm resignation and validity of action of parties represented by Truman E. Johnson. Will you advise."

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Mr. Johnson was representing the committee of 2561 the National Bituminous Coal Wage Operators Negotiating Committee and you inquired here as to whether or not Mr. Van Horne has resigned. Do you recall that? Do you recall that, Mr. Lewis? A. If that is a valid copy of the telegram it must be true. But those are details that I explained to you the sequence of conversations and messages that I don't now recall in their proper order.

Q. And Mr. Van Horne replied, and I believe that you examined the at the time of the deposition. Don't you recall that?

Mr. Rowntree: Will counsel stipulate that?

Mr. Kramer: Yes, we will stipulate they were shown to Mr. Lewis when we took his deposition—when they took his deposition.

Mr. Rowntree: and Mr. Van Horne replied:

“Re the telegram of November 16, I again confirm my resignation of September 14 as trustee of the U.M.W. of A. Welfare and Retirement Fund. I will not be present at the meetin the trustees on Monday morning at 10 o'clock, November 21. I am notifying Judge Charles I. Dawson of this meeting, who has been appointed by the Coal Operators as my successor, according to the information I have received. I have no doubt that this appointment has 2562 been made in a proper manner and that Judge Dawson is a member of said board. Sending a copy of your wire and this wire to Senator Bridges and Judge Dawson.”

By Mr. Rowntree:

Q. Now do you recall that was a called meeting of the trustees? A. I admit it is in the record.

Q. There are no minutes of that meeting? A. What difference does it make? What bearing on the case?

Q. We would like to know what happened, Mr. Lewis. A. What happened is already on the record here from my testimony this morning. For all intents and purposes, con-

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clusive, as far as I am concerned Judge Dawson was not seated at that time.

Q. You say — A. And evidently Judge Dawson must have had some change of heart because he never returned, only the two times, and we heard no more from him.

Q. Well, the contract was signed right after that, wasn't it, Mr. Lewis? A. I don't know what date now. I don't know what the relationship is of the two dates. It did not
2563 affect the merits of whether Judge Dawson was a trustee because the operators had no authority to determine a trustee.

Q. And Mr. Owens — A. They selected an individual and recommend him for the trusteeship, but the acceptance of the trustee depended upon the Board of Trustees itself and seating and qualification.

Q. Now some of the previous witnesses have said that the requirement of union membership to participate in welfare benefits ceased in 1950 but the requirement of union membership continued on after 1950, did it not, Mr. Lewis? A. I don't know. Whatever the evidence is it is down in black and white on the record of the Fund and I suppose that is available. I don't know those dates.

Q. Well, I refer to your deposition. Question —

Mr. Kramer: Page, please.

Q. (Continuing) 154, bottom:

2564 "We refer to pages 488 and 489 of the same Minutes, 1952, where you made this statement:

"Based upon present computations governing the" — this is 1952—"Based upon present computations governing the life expectancy of individual members, \$18,000 will be paid on the average under each pension award. Certainly we cannot continue to pay out that \$18,000 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization. The basis of his monthly dues was previously fixed by a Convention

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as being the minimum that would qualify, as Vice President Kennedy says, as a proper consideration in the premises.' "

Answer: "Those statements were predicated upon the conditions existing at that time and not necessarily the law and the prophets in 1961."

Question: "But this was 1952 after the signing of the 1950 contract?"

Answer: "Exactly so. Exactly so."

"But the whole question has been clarified since that time, and it is definite that a pensioner does not need necessarily, to take his pension, to obtain membership in the United Mine Workers of America; and it is not true that only

members of the United Mine Workers are eligible 2564a for awards."

Now that question is —

A. I reaffirm the questions and statements made in there.

Q. When was this question clarified? A. Whenever applications come in in due course. The dates, I don't know, but you have on the record here testimony from the representatives of the Fund, and myself, that it is no longer a restriction and has nothing to do with the working of the 1950 industry contract as amended from time to time.

Q. But the question is when and by what means this question was clarified after — A. The records of the Fund —

Q. After '52. A. —would show that. I cannot give you the information out of my head because I do not have —

Mr. Kramer: The 1950 agreement is here and itself contains the phraseology and shows that union membership is not required after that time. It does not show when before that, or if ever, it was terminated. It was required under the 1947 agreement and was never required under the 1950 contract, and those agreements are all here, your Honor. I don't know what we are driving at.

2565 By Mr. Rowntree:

Q. But your statement here, Mr. Lewis, was that it was a consideration and a requirement in 1952, and my question is when was it later clarified or changed? A. You

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have my answer, that I personally do not possess that information.

Q. And what — A. And I do not concede your extraneous remark based upon your understanding of the so-called interpretation.

Q. And what steps did the trustees take to show to the industry and the men in the industry that there was a clarification and that there was a change in this requirement? A. The whole question was of insignificance and affected few men that I doubt there was any general nationwide publicity put out about it. It was merely a matter of routine performance.

The welfare fund and its provisions had previously been reported to the membership time after time in the nationwide publication, United Mine Workers Journal, which goes to every member of the union and is read by everyone, almost, in the coal industry or who is interested in the coal industry and in the communities where the mines exist and the mine workers live.

2566 Q. Isn't it true, Mr. Lewis, that you felt or that you believed that the union could run the Fund, the welfare fund? A. I never attempted to put such an idea into effect. We always conceded the right of the industry to be represented in some capacity, and we conceded the right of the Government to be represented through a neutral trustee from the very first day of negotiations on this fund with the Government and never an issue. We had no such allusion. We did not necessarily want that responsibility.

I have always considered that the first function of the operators' trustee is more or less to be able to assure all and sundry that the trust was run honestly and its expenditures were for the purposes authorized in the trust agreement, and it has been proved so many times that it needs no reiteration.

Been investigated by the United States Senate, the public

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auditor reports annual on the excellent condition they find it in. That verifies the averments I just made. What greater character could come to the Fund?

Q. Referring again to the deposition, page 24 at the bottom:

"Did you not realize sometime in that period that a welfare fund, run by the union itself, would also be
2567 illegal?"

Answer: "No."

Question: "Was it your concept all the way through that the welfare fund could properly be operated by the union?"

Answer: "Certainly."

A. I don't recall recognizing that point during the period to which you refer because I had no need to. The question was finished. And I wasn't digging up things that were not pertinent to the current issues of the case, whatever they were. I was not dwelling in the past and was not going on it. We had settled that question in the coal industry—

Q. Yes, sir. A. —and I have made my contribution, or tried to, to the success of that policy.

Q. And Mr. Love testified in the case that the name of the trustees, who they would be, was an issue in the 1950 negotiations. A. Why what, sir?

Q. Mr. Love testified that the name of the trustees, who they would be, was an issue in the 1950 negotiations? A. Well, I recall that statement.

2569 By Mr. Rowntree:

Q. Mr. Lewis, are you advised that the contract, the National Bituminous Coal Wage Agreement has been imposed upon small mines in east Kentucky and east Tennessee by means of violence? A. No.

*Testimony of John L. Lewis***REDIRECT EXAMINATION**

By Mr. Kramer:

Q. Reference has been made in this record on page 68 of your testimony as given on deposition taken by the cross plaintiffs some time ago, and I fear we do not have a clear impression of what is in that deposition, and I desire to read it, may it please the Court. Part of it was read by opposing counsel. The question was asked by Mr. Rowntree:

"I would like for you to read particularly the first paragraph under your name there, the name of President Lewis."

And he is reading from some of the minutes of the international convention.

"The first paragraph and also the paragraph starting at the bottom of page 296. Those two paragraphs. 2570 And also the second full paragraph on page 297.

"And the paragraph after that reads:

"So next year in 1949 or at any other time when evil days come upon this industry you will find the United Mine Workers of America moving in and, if there are only three days work in this industry, we will all have the three days work'."

And that is the quotation that was referred to you rather than that you were advocating the three day work week, your Honor, and that is all I have.

The Witness: Of course —

Mr. Kramer: That is all right. I just wanted to get it straight. You needn't answer. That is all.

May Mr. Lewis be excused?

Mr. Rowntree: Yes. You may go.

Juror: Before the witness steps down, I would like to ask two questions. One concerns the recruitment of members. We have had testimony here, at least from one witness, of violence being used up in this Jellico area in which the member was beaten up until blood run from his mouth. Is that the policy of the United Mine Workers or yourself, or if it

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is not, what discipline has been given to the members who did that, which included Mr. Maddox, I think, Mr. Daniel and many other union members?

2571 The Witness: Sir, it is not the policy of the United

Mine Workers. It is not my policy as an individual or representative of the union and never has been. We assume that if that is true, that the resources of the law will be put in protection behind the man thus treated by whoever the parties were who committed the assault, and I have no knowledge of that.

The United Mine Workers cannot undertake with any degree of success to regulate the personal actions or the impetuous undertakings of members of the United Mine Workers situated in their own home areas and far removed from any connection with the basic office of the United Mine Workers.

Men who become agitated or enraged over a local circumstance sometimes commit actions of violence of which no one could restrain them, and we are totally inadequate the private lives or the morals or the understandings or the convictions of individual members.

Juror: If it comes to your notice, would you discipline those members for doing such a thing?

The Witness: Certainly, certainly, if it comes within the purview of our right to do so under the constitution as defined by the delegation at the convention, but you un-

2572 derstand there is very little we can do, because we

are restricted by statute on the amount of discipline we can impose on an individual member, the federal acts, and we find it very difficult sometimes to carry out the policy of operating lawfully under the law while Congress has taken away our rights to discipline the individual member.

Juror: That answers my question at way.

Now the other question is a question of the validity and I would better say certainness of contracts. I was reared in

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a home where if I gave my word or my father gave his word —

The Court: Now, Mr. Juror, I am afraid you are going too far. We don't want error in this record. If you want to ask Mr. Lewis some questions involving fact, you may do so.

Juror: This is involved in the testimony we have had, your Honor.

The Court: Well, let's just keep it right on the facts, because we must be careful not to get out of the record.

Juror: I realize that.

The Court: And we must be careful about quoting the record. It is not proper for counsel to tell what some other witness has sworn. I ask the juror to follow that 2573 rule. The Court has been liberal with counsel because counsel have worked so hard in this case and the facts are so complicated. That is one of the reasons that the Court has been liberal with counsel, but I want to be careful now not to get error in this record by the juror or counsel undertaking to quote to a witness from memory some parts of the record, Mr. Juror. Keep that in mind.

Juror: I will try and stay within the limitations, your Honor, and if my question is not proper, I want you to rule it out.

The Court: All right.

Juror: We had testimony here the better part of two weeks ago that one coal firm signed up a contract with your United Mine Workers. He talked with you directly and he signed the agreement, your national agreement, where you had a gentlemen's agreement with this man in which he was allowed to lease out, or at least that was the indication, he could lease out some of the property without affecting the agreement. He said that you kept it.

Here a little later in the St. Ellen mine near O'Fallon, the Progressive Workers, as I understood the testimony, had a valid contract to run for some months. When they

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came back from the vacation, which the contract allowed them to have, they were given the word apparently that they either had to belong to the United Mine Workers or be out, period.

That was a breaking of another contract by another company, with Peabody incidentally. Now then, this suit here was started by the trustees of the Welfare Fund wanting to hold up a contract and make the Phillips Brothers hold to that to the letter to the last penny.

Now my question is this. By what notation of ethics or moral law or legal statute can you explain these differences of handling these three types of contracts?

The Witness: I can only say —

The Court: Just a minute, Mr. Lewis.

Mr. Kramer: Of course, your Honor, it is argumentative in that it assumes facts. I dislike to say anything about a question by a juror, but I fear it is improper.

The Court: I do, too.

2575

JOHN OWENS

called by and on behalf of the cross defendant.

2576

DIRECT EXAMINATION

By Mr. Combs:

Q. Will you state your name? A. My name is John Owens.

Q. Where do you live? A. I live at Cambridge, Ohio.

Q. What position do you hold with the United Mine Workers? A. I am international secretary-treasurer of the United Mine Workers of America.

Q. Just in passing, Mr. Owens, who is the present president of the United Mine Workers? A. Mr. Thomas Kennedy.

Q. Do you know where Mr. Kennedy is now? A. He un-

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underwent surgery last month and he is recuperating at his home in Hazelton, Pennsylvania.

Q. He is still under doctor's care? A. Yes.

Q. Mr. Owens, how long have you been secretary-treasurer of the United Mine Workers? A. Since January 1, 1948.

Q. Did you work in the coal mines before you became associated with the United Mine Workers? A. Yes, sir.

2577 Q. At what age did you go into the coal mines? A. I went into the coal mines in September 1901, when I was ten years of age.

Q. And how long did you work in the mines? A. I worked in and around the coal mines until April 1, 1921.

Q. What mines did you work in, Mr. Owens? A. Well, a number of mines in the State of Ohio, some in Illinois, but mostly in the coal mines in Guernsey County in the State of Ohio.

Q. Did you suffer a serious injury in the mines? A. When I was 15 years of age I had a serious accident. I lost my right limb.

Q. From an accident in the mine? A. Yes, sir.

Q. Mr. Owens, when did you first become a member of the United Mine Workers? A. In September 1901 when I was ten years of age.

Q. And when was the first official service that you had with the mine workers, that is working for the organization as such? A. Well, I did everything there is to do in and around a coal mine and in various capacities as an officer of the local union and was elected vice president of what is known as Sub-District No. 6 and District No. 6 in the State of Ohio in 1920 and took office April 1, 1921.

2578 Q. How long did you hold that office? A. Well, I became an international representative, I think, in perhaps 1927 or '28. Later on I became, in 1934, president of District No. 6 of the Ohio miners, and was president un-

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til January 1, 1948, when I became international secretary-treasurer of the mine workers union.

2579 Q. During part of the time, just prior to your assuming the office of the secretary-treasurer, did you act at one time as an assistant to President Lewis in contract matters? A. As president of District Number Six, I was requested to participate as an assistant to President Lewis, I think those, on a temporary basis, prevailed from approximately 1921 up until I was made International secretary-treasurer, and I have been working under his direction ever since.

Q. Now, Mr. Owens, as president of District Six, on up until you became secretary-treasurer, did you participate in the bargaining of the various contracts between the operators and the union? A. I have attended practically all of the national conferences that was convened for the purpose of negotiating a wage agreement between the operators and the union? A. I have attended practically all of the national conferences that was convened for the purpose of negotiating a wage agreement between the operators and coal miners, either as a president of District Number Six, or a representative of the International union, since 1922.

Q. Would you describe to the Court and the jury the methods that the union used to select its bargaining representatives and also the customs and practices of the operators in selecting their representatives who met with the union to bargain for a contract? Would you briefly describe how those people are selected? A. In fact, 2580 it works like this: in all of our geographical locations, and there's twenty-eight states where coal is produced, there is a certain number of coal operators and a certain number of miners, and the United Mine Workers of America, in its conventions, creates what is known as the policy committee, which is authorized to meet with the representatives selected by the coal operators in some agreed city prior to the expiration of the contract.

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The representation of the miners are selected by the delegates from that section that creates a representation in that state, and it is the coal miners from the coal mines who elect them and they are on the policy committee as negotiators when we convene as prescribed by the contract or agreed to by communication between the operators and the coal miners union.

And likewise the operators' representations, representation is selected by the members of their local associations—Southern Appalachian sends so many representations, Alabama, Western Kentucky, Island County, Hazard Field, Northern West Virginia, Southern West Virginia, and all of the associations constitute those geographical locations that are enumerated in their contract as being associations that have a right to participate in the joint conferences.

Sometimes, there—there were up until the industry insisted upon reducing the representation, we would
2581 meet in joint conference in some convenient city with the representatives of the press present, sometimes as many as a hundred and seventy-five on each side, and the representatives of the miners would present their suggestions that they inserted in a new contract and the representatives selected by the coal operators would either—would present their reasons why the suggestions made by the representatives of the miners should not be included in a new contract, and after about two or three days of public discussion, with the press present, they would move to reduce the representation on both sides to a committee perhaps of sixteen or eight, who would meet from time to time to try to negotiate a successor contract.

Q. Did the United Mine Workers of America, or do they, have any standing in connection with the selecting of the representatives of the operators, do they interfere with that, or do they have any standing there? A. No, sir.

Q. Now, the contracts negotiated in these bargaining conferences that you just described; is that contract sub-

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mitted for approval to the policy committee by the negotiating committee? A. We cannot accept an agreement. We might agree tentatively subject to the approval of the policy committee. Never in the history of negotiating wage contracts has the executive officers of the
2582 organization ever signed an agreement until it was approved by the men on the policy committee elected by the men who work in the coal mines, and they authorize them to consummate the agreement.

Q. Was that agreement, as consummated, does it then become the industry agreement as far as the union is concerned? A. Yes, sir.

Q. Now, in connection with the negotiations of those contracts, those operators who are not represented at the conference in what way are those negotiations carried on?

A. If there is an operator that isn't represented in the national wage conference, he isn't a member of any association, then our representatives generally confer with him and in most instances, they work out arrangements where the contract can be executed in conformity with the national agreement.

Q. In connection with the district presidents and the district field workers who make these contracts with operators who were not represented at the conference, do they have authority to change that agreement in any way? A. Well, not without the consent of the representatives of the Mine Workers Union, or the policy committee.

Q. In other words, if negotiations or contracts are made with individual operators who desire a change in
2583 the contract, that would have to be submitted back to the policy committee on whether or not to negotiate on a separate contract, or whether or not they would approve a different contract? A. Yes, counsel, if you didn't do that, you would vitiate the whole procedure, make it inoperative.

Q. Has that been the practice over the years? A. Since the inception of our union, as far as I know.

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Q. And that was true from 1950 to the present day?
A. Yes, sir.

Q. Now, Mr. Owens, we have in the record here contracts that were negotiated from 1941 up to and including the contract negotiated in 1958, commencing with the Southern Wage Agreement, July 5, 1941; the Southern Appalachian District Agreement, April 1, 1943.

Now the contracts, the 1950 contract, did it incorporate certain provisions that were contained in the 1941 and 1943 contracts, carry those provisions over to the 1950 contract? A. In the 1950 contract?

Q. Yes. A. Yes.

Mr. Combs: Now, in order to go back to the contracts, Your Honor, in order to get a continuity, I suggest a stipulation with counsel.

The Court: Yes, sir.

Mr. Combs: The 1943 contract that was in evidence here in this book goes from 1943—it goes to the National Bituminous Coal Wage Agreement of 1945.

Now there is a gap of some two years. Now during that gap, the mine workers and the operators negotiated what is known as the First Illinois and the Second Illinois Agreements of 1943; they negotiated what is known as the Ickes-Lewis Agreement of 1943; they negotiated what is known as the December 17th Agreement to the Ickes-Lewis Agreement of 1943; but all of the provisions of these contracts that I named that are not in this booklet were carried over by supplemental contracts as stated in the record, and I would like for counsel to stipulate if he would without the necessity of putting these extra contracts in for that purpose.

Mr. Rowntree: That is perfectly all right, Your Honor.

The Court: All right.

By Mr. Combs:

Q. Now, Mr. Owens, I would like to briefly go
2585 over these contracts that are in the record and ask you whether or not that you participated in the

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negotiations of these contracts. A. Yes, sir.

Q. 1941 Appalachian contract? A. Yes, sir.

Q. The Six-Day Supplemental Agreement of 1943? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1945? A. Yes, sir.

Q. That National Bituminous Coal Wage Agreement of 1947? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1948? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1950? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1951? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1952? A. Yes.

2586 Q. The National Bituminous Coal Wage Agreement of 1950, as amended September 1, 1955? A. Yes.

Q. The National Bituminous Coal Wage Agreement as amended October 1, 1956? A. Yes, sir.

Q. And then the National Bituminous Coal Wage Agreement amended 1958? A. Yes, sir.

Q. So that is presently the current agreement, the 1958 contract, in the industry at this time? A. Yes, sir.

Q. And you participated in the negotiations of those contracts? A. Yes, sir.

Q. I call your attention to the negotiations to a successor contract or the contract, the record shows, was terminated in 1949, I believe in April.

Would you tell the Court and jury some of the circumstances that brought about the termination of the 1948 contract in 1949? Who terminated that contract?

2587 A. The International Union received a communication signed by Mr. Joe Moody, president of Southern Coal Operators Association—I think it was dated April 21, 1949—terminating the agreement, giving 60 days notice terminating the agreement effective June 30, 1949.

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Q. Now did the northern operators give similar notice?

A. No. The northern operators had not served any notice due to the economic conditions of the country in 1949. The United Mine Workers of America had no intention of terminating the agreement, and if the operators had not terminated there wouldn't have been any cessation of work until more favorable conditions prevailed. So we wanted to negotiate a contract without any cessation of work at all. They elected themselves to do it.

Q. That was the so-called 60 days notice under the contract? A. Under the law and under the contract.

Q. Did conferences ensue to try to negotiate a successor contract to the one that was expiring or terminated? A. We met at the request of the southern coal operators on May 25th at Bluefield, West Virginia.

Q. Was there another group that met at White Sulphur Springs? A. And a northern group was assembled 2588 at White Sulphur, West Virginia.

Q. Mr. Owens, were you assigned to either one or both of these conferences; did you participate in them?

A. I attended off and on both of the conferences, but I was assigned by President Lewis to direct negotiations at the Bluefield conference.

Q. I take it from time to time that you reported back and forth about both conferences? A. Yes, sir.

Q. Mr. Owens, at the time that these conferences convened would you tell the Court and jury the position taken by the mine workers and the position taken by the operators as to a successor contract? A. The mine workers went into the conference with an open mind, not knowing what was in the minds of the representatives of the operators. We had no fixed plans.

We attended it at their request and was there to listen to any proposal, real or imaginary, that they may suggest to have written in the contract to succeed the one that was expiring on June 30, 1949.

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And we listened and we discussed every proposal, real or imaginary, concerned in the conference or handed to them on the street, they would present formally to the joint conference.

2589 Q. What position were the operators taking? A.

The position of the coal operators as they expressed themselves in that conference, we believe that they wanted to emasculate the existing welfare and retirement fund and deny the senior citizens employed by them when they became incapacitated the right to enjoy a pension that they may endure in the senior years of their life.

2590 A. Naturally we had some lengthy discussions about accepting that proposal.

Q. During the time these negotiations were going on, after June 30th, were the mines operated? A. Sir?

Q. Were the mines operating after the termination of the contract, after June 30th? A. Not under contract.

Q. Did the question come up about working three days a week in some manner between the operators and the union? A. The question of supplying coal to any market that may be in distress is always of uppermost interest to the representatives of the Mine Workers Union, and we suggested formally that the industry should work three days a week, which would alleviate any apprehensions upon the citizens of America that they would be in want of coal. And we volunteered to do that in the face of them terminating the agreement without consulting with us. Did it unilaterally.

Q. Did the operators accept the proposal? A. Well, some of them worked their mines, some of them. But they refused to pay, in some instances, stipulated requirements that was in the contract that they had terminated on June 30th. Statements of the industry didn't pay forty cents a ton, or thirty cents a ton.

2591 Q. What did the operators, what position did they take with reference to the union's offer to work

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three days a week in the mines? A. The offer of working three days a week in the mine was just a device or a condition that was required, we thought, to the needs of the country. Mine workers don't want a three-day week. Coal miners want to work at least five days a week, and they want to work at a wage scale that they can maintain their families, educate their children, clothe them properly, and give them the proper requirements so they can grow up morally, mentally, and physically to be good American citizens. And you cannot do that unless those conditions are sustained by an income that will permit them to put it into effect.

If it wasn't true, India and China would be the greatest nations on earth.

2593 By Mr. Combs:

Q. Mr. Owens, when we finished yesterday afternoon we were talking about the wage negotiations of 1949. I had asked you about the position of the union with relation to the three-day work week.

Now did those negotiations continue on through the summer and winter of 1949? A. They continued from May 25th, 1949 intermittently, until we consummated the agreement on March 5, 1950.

Q. During that time did you have frequent conferences with the operators? A. Yes. At their convenience 2594 we met both with the Southern Appalachian group and the northern group.

Q. Did there come a time in December of 1949 and January of 1950 when the operators brought certain charges against the union before the War Labor Board? A. Yes, sir.

Q. Do you recall whether or not—the National Labor Relations Board rather than the War Labor Board, counsel advises me. A. Yes, sir.

Q. Do you recall whether or not that the federal District

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Court at Washington issued a restraining order on the application of the counsel for the War Labor Board? A. Yes, sir.

Mr. Combs: I am sorry. I keep saying War Labor Board. It is the National Labor Relations Board, your Honor.

The Witness: I was a witness.

By Mr. Combs:

Q. Do you remember just generally what those charges were about, Mr. Owens? A. No, I don't, counsel. I don't recall in general.

Q. Do you recall whether or not that it had to do with the so-called union shop? A. Yes, sir.

2595 Q. And memorial periods? A. Sir?

Q. The memorial periods? A. Yes, sir.

Q. And did it have something to do with the qualifications or eligibility of members to receive the welfare benefits? A. Yes, sir.

Q. Now in the restraining order issued against the union was there a provision in that order that required the parties to negotiate to settle that dispute? A. Yes, sir.

Q. Now again do you recall whether or not that the Attorney-General sought an injunction under the emergency provisions of the Labor Management Relations Act? A. I think he did, sir.

Q. Do you recall whether or not a temporary restraining order was issued on the application of the Attorney-General? A. I think so, sir.

Q. Do you recall whether or not that in that temporary restraining order the Court required the parties to bargain to try to settle the dispute? A. Yes, sir.

2596 Q. I believe those restraining orders were issued sometime in February, were they not? A. I wouldn't be positive as to the date, but I think it was in February.

Q. Did the parties negotiate pursuant to those restraining orders? A. Yes, sir.

Q. Would you tell the Court and jury what terminated

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those negotiations. Was a contract executed? A: We executed a contract on March 5, 1950.

Q. And that became what is known as the National Bituminous Coal Wage Agreement of 1950? A. Yes, sir.

Q. Mr. Owens, at the time that that contract was negotiated in 1950 between the union and the operators, was there any other kind of agreement of any character besides the 1950 contract? A. No, sir.

Q. Was there any understanding or plan or aim agreed to for concerted action on the part of the operators and union at that time? A. No, sir.

Q. Mr. Owens, I would like to ask you some questions in regard to certain provisions of that contract.

Number one: Do you recall the increase in wages
2597 that was provided in that contract? A. Seventy cents a day.

Q. Were the welfare payments increased? A. Nineteen—

Q. 1950. A. I don't think so. Yes. It was increased to 30 cents, wasn't it?

Mr. Combs: Your Honor, I would like to refer to the exhibits in the record here, the wage agreement, and recite, with permission of the Court, the increases in the welfare fund from 1946 at the time the welfare fund was negotiated with the Government.

By Mr. Combs:

Q. This 1946 contract in evidence provided that payments into the fund should be five cents. A. That is right.

Q. Per ton of coal produced for use or for sale.

In the 1947 amendment to the contract the payments per ton were increased to ten cents per ton. A. That's right.

Q. In 1948 the payments were increased to 20 cents per ton. A. That's right.

Q. 1950 to 30 cents per ton. A. That's right.

2598 Q. 1952, 40 cents per ton. A. That is right, sir.

Q. Is that the amount per ton that is paid in on the present contract, that is the 1958 contract? A. It hasn't been changed for approximately eight years.

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Q. So from 1946, commencing with five cents per ton negotiated with the Government, the payments into the welfare fund have increased to 40 cents, a period of some 15 years. A. Yes, sir.

Q. Mr. Owens, I would like to have you tell the Court and jury briefly just how these wage increases were applied, commencing in 1943. Just generally how were those wage increases applied on up to 1950. A. In 1941 the wages of the coal miners as stipulated in the contract was \$1.00 an hour. We entered into a two-year contract. The United States Supreme Court entered a decision, I think sometime in 1947, that the coal miners were entitled to be paid for travel time.

The 1941 contract provided seven hours a day, time and a half for all time over seven hours at the working place, including travel time.

The Court: Would you mind repeating that.

A. (Continuing) The 1941 contract provided for 2599 \$1.00 an hour per day for a 7-hour day at the face or working place. The Supreme Court, under petition of the various courts, decided that the miners were entitled to pay for travel time.

Q. Would you explain, briefly, to his Honor, what you mean by travel time. A. That is from the time they enter the mine until they return at quitting time.

They created a commission and said the average travel—the commission reported that the average travel time was one hour in the coal mines in the United States, after an exhaustive study all over the United States. And the Supreme Court ruled that we were entitled to pay for travel time.

Q. I believe that decision was under the Fair Labor Standard Act, was it not? A. I forget the terminology.

Mr. Combs: That is what it was, your Honor, the Fair Labor Standards Act.

A. (Continuing) We elongated the contract under re-

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quest to work eight hours a day in conformity with that agreement, which brought the wages up under the contract without modifying it to \$8.50 a day. That raised the miners' wage in the coal mines of America to \$1.06¼ per hour. The War Labor Board then, under proper
2600 petition, said that we were entitled to time and a half at two-thirds of the hourly wages after 40 hours for travel time.

2601 We worked under that and it never was changed.

We elongated the contract in 1945 to include nine hours to \$10 a day, and that was the first increase, and it wasn't in fact an increase, which brought the miners wages up to \$1.11, \$10 a day for nine hours' work. And that brought about the turmoil and the dissatisfaction in the industry that caused the cessation of work that was participated in by the miners because they never received an increase in wages that wasn't provided for in the 1941 contract until the year 1946, and they worked all during that period.

Q. Now during that time, 1941 until 1946, were the government seizures of the mines during that period? A. Yes, sir.

Q. How many times? A. I wouldn't be positive, but I think perhaps twice or three times at that time.

Q. All right. Now 1946, what was the increase, or did you have an increase in the 1946 contract? A. The national increases that was recognized that was being put into effect in all the basic industries in the United States was 18½ cents per hour, and we increased the wages \$1.85 an hour—a day.

Q. Your reference to that for the clarification of the Court and jury, that was the government executive order that recognized the cost of living had increased that
2602 percentage, was it not? A. That is the first time we enjoyed it.

Q. All right. Was there government seizure of the mines in 1946? A. Yes, sir.

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Q. Do you recall what brought that about? A. Well, the failure to negotiate contracts was primarily responsible for it.

Q. Now when was the next wage increase? A. You mean after 19—

Q. '46. A. '46, 1947 agreement provided for \$1.20 a day, I think it was.

Q. \$1.20 a day in 1947? A. Yes, sir.

2603 Q. Did you tell us what the '48 increase was? A. I don't recall the exact figures in the 1948 contract without looking it up, sir.

Mr. Combs: All right, we can refer to the contract later on that, your Honor.

I would like to get it in chronological order, if you will give me a second.

Your Honor, I refer to Exhibit 77 in the record here, 1948 contract, under the heading wages and hours, B, which provides as follows: "All mine workers, whether employed by the month, day, or tonnage, yardage, dead-work or footage rate, shall receive \$4.05 per day in addition to that provided for in the contract which
2604 expired March 31, 1946."

The Witness: Counsel, that is \$1 a day increase.

Mr. Combs: So that would be a dollar a day.

In other words, your Honor, these contracts impacted the increase from '46 and it doubled up that way so it was a dollar a day.

The Witness: From \$1.85, \$3.05, 1948, \$4.05.

By Mr. Combs:

Q. Then in 1950, I think you testified that the increase was 70 cents per day? A. That is right, sir.

Q. Now the welfare payments, Mr. Owens, were on a tonnage basis, were they not? A. Yes, sir.

Q. That applied to mechanical mines or hand loading

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mines, without any difference as to how the coal was produced? A. Yes, sir.

Q. Did that necessarily have the effect that the mechanized mines would be paying more than the smaller mines?

A. It is 40 cents a ton. They produce 20 tons or two tons, 40 cents a ton.

Q. In other words, the hand loading mines, if they produced 10 tons of coal or 6 tons per day— A. They paid less.

Q. They paid less. In other words, it was based on 2605 tonnage ratio. Now, Mr. Owens, you participated in the negotiation of all of these contracts and contracts that have been negotiated before. Now in the 1950 contract was the wage scale or the payment of the Welfare Fund in any way tailored to suit any particular type of mine or any particular size operator? A. No, sir.

of mine or any particular size of operator? A. No, sir. security clause that we call it in the 1950 contract. I read a provision from Exhibit No. 77, I believe it is, as follows: "It is further agreed that as a condition of employment all employees shall become members of the United Mine Workers of America to the extent and in the manner permitted by law."

Mr. Owens, was that particular clause in the '50 contract—was that clause in the 1948 contract, the predecessor of the 1950 contract? A. That succeeded the 1948 clause.

Q. Was the clause different in the 1948 contract? A. Yes, sir. Just a minute, sir.

2606 Q. I refer—I think I can do this a little faster,

Mr. Owens, if you don't mind, I am going to refer to the 1941 Southern Appalachian Wage Agreement contained in Exhibit 7, on page 20. And I read the following:

"It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part;

"It is agreed that as a condition of employment all employees shall be members of United Mine Workers of America."

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Now, was that clause that I just read carried forward in the contracts between 1941 up to and including the 1948 contract? A. Yes, sir, as I understand it.

Q. And the change in the wording as I have read it to you was made in the 1950 contract? A. Yes, sir.

The Court: What contract?

Mr. Combs: The 1950 contract, Your Honor.

Mr. Rowntree: If your Honor please, I would like to know did the National Bituminous Coal Wage Agreement of 1950 adopt the Southern Appalachian Contract to which you just referred or not?

Mr. Combs: In reply to that, Your Honor, the 2607 contract itself says that the preceding contracts were carried forward except as modified and supplemented by the contract of 1950. So where it is modified and supplemented, it is not carried forward.

Mr. Rowntree: The Southern Appalachian District Agreement was a separate agreement from the national contract.

Mr. Combs: That is true, and if counsel would like, I will refer back to the Southern Appalachian agreement, the Southern Wage Agreement. That provision in there is all the same provision. There is no difference in any of it.

The Court: Originally the contracts provided for a closed shop, that is to say that all employees had to be members of a union where there was a collective bargaining agreement in order to work.

Mr. Combs: Yes, Your Honor, but—

The Court: Was that in 1941 and continued up until the time it was changed by the Taft-Hartley Law, and if so, when was that changed?

Mr. Combs: It is what we call—and it does have a legal

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2608 difference—it is a “union shop” not a “closed shop”, and I would like to say, Your Honor, I think it might be well to explain the difference because I think it is important.

A closed shop contract as we understand it requires an employer to only hire people who belong to the union before they are hired.

The Court: I see.

Mr. Combs: Now the Mine Workers have never had a closed shop contract in all of their career. They have taken the position that they do not interfere with the hiring of the employer. That is his right. But once a man is hired, there and under the union shop clause, generally the provision is that he shall become a member of the union during the life of the contract within thirty days, say.

The Court: I see.

Mr. Combs: Then to get back to Your Honor's question, the provision that I just read was contained in the 1941 contract relating to the union shop, and that provision had been carried over from the thirties in those contracts, but I don't think it is important to go back that far.

Now, 1947, the Taft-Hartley Act became effective about the time the '47 contract was in effect. It was enacted one date, and became effective in August of that year.

2609 That contract was carried over, the '47 contract with the same provisions in it, after the Taft-Hartley law was effective until—and was carried over in the '48 contract.

That was the charge that the operators were making that this old provision in the 1948 contract was in violation of the Taft-Hartley Act, which had become effective the latter part of 1947.

The Court: Now, the Taft-Hartley Act in 1947 prescribed union shop, is that right?

Mr. Combs: Yes, Your Honor, to this extent. In 1947, the Taft Hartley Act provided that if a union had a contract

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or if the employer and the union entered into a contract containing a union shop, at first they must have an election in the unit, the appropriate unit where a majority of the employees would authorize their union to execute the union shop. And in addition to that that the officers of that union would have to make certain reports to the Secretary of Labor, and would also have to file what we call the "Anti-Communist" oath, in order to be allowed to have a union shop. That was the law.

I believe it was in 1952 that the Congress repealed the section providing for a vote of the employees on whether they would have a union shop or not.

2610 In 1959, the Landrum-Griffin Act repealed the entire section relating to that union shop and required the union to report on these financial business regardless of whether they had a union shop or not. Got nothing to do with it.

The Court: Well, did the Taft-Hartley Act say that you could not have union shops in states that had open shop? When was that?

Mr. Combs: I think that provision was in Section 12 of the '47 Taft-Hartley Act which provided that if a state had what we called — what we call, but it isn't the terminology of the Congress — what we call a "right-to-work" statute, that this Act of Congress could not prohibit that, that the state would have the right to go ahead with that, and that is the law.

The Court: So in Tennessee, in 1947, you could not have a union shop?

Mr. Combs: That's right, Your Honor. You are right.

The Court: I just wanted to get the dates.

Mr. Robertson: While we are on this subject, I would like to point out to Your Honor that the Taft-Hartley Act of 1947 does not say anything about the clause was
2612 not an effective union shop clause, and the Court so held, because concededly, the union had not complied

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with the requirements to have the union shop, and they did not claim they had a union shop during the period of time that we are involved in in this suit up until the Landrum-Griffin Act was passed.

By Mr. Combs:

Q. Now, Mr. Owens, getting back to this clause that we are discussing here, the union security clause, was there any plan or agreement or concerted action on the part of the union to use this wording of this clause in order to dominate the employees in the mining industry? A. 2613 No, sir.

Q. Was it ever used in any such manner? A. It was the desire of the negotiators of the United Mine Workers to comply with the law, and it so states in conformity to the law.

Q. Now, I would like to direct your attention to the clause in the 1950 contract known as the "application to coal lands," what we call the "land-lease" provision.

2614 I believe that that provision first appeared in what is known as the Illinois Supplemental Agreement of 1943; is that your recollection? A. Yes, sir.

Mr. Combs: That clause provides as follows — Section 11, your Honor. We have stipulated on this contract but I would like to read the provision out of that contract. We stipulated that we don't need to put it in.

Mr. Rowntree: Can you tell me where it appears in the 1945 agreement?

Mr. Combs: It does not appear. That is why I wanted the stipulation. All the provisions were carried over into the 1945 agreement. That same application of coal lands would be in the 1945 agreement.

Mr. Rowntree: Is this in this exhibit?

Mr. Combs: Yes. "Application of coal lands."

Mr. Kramer: It is in this Exhibit 77?

The Witness: Section 14 of the 1945.

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Mr. Rowntree: Is it expressly set forth in the National Bituminous Coal Wage Agreement?

Mr. Combs: It is expressly set forth, and I was coming to that, in the 1952.

Mr. Rowntree: 1952?

Mr. Combs: Yes. And it is carried over by reference in the 1945 contract. It goes on over and appears in the 1952. I will read that in a minute.

This Illinois agreement was signed by the union and certain operators in September of 1943. At that time all the wage agreements or amendments thereto had to be submitted to the War Labor Board for approval.

The decision of the War Labor Board with reference to this particular provision was handed in on October 26, 1943 approving, and disapproving certain provisions of the contract; that the Board recited it had no jurisdiction and had no interest in the land leasing provision since it did not involve wages. However, Section 11 of this contract of Illinois, dated October, 1943, contained the following provision.

"The operators agree that they will not lease any operating mines subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement."

By Mr. Combs:

Q. Mr. Owens, is it your recollection that that was in the contract at that time? A. Yes, sir.

Mr. Rowntree: Just for clarification, your Honor, this Illinois agreement, what was that? What territory did it cover?

Mr. Combs: The Illinois agreement covered primarily the section of Illinois. There may have been other mines that were members of the Illinois association but primarily Illinois. That contract was negotiated and submitted for approval to the War Labor Board with the intention of the mine workers, if possible, to make that the industry agreement. It did not become the industry agreement as such.

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But through the approval of the War Labor Board of the wage provisions leading to the negotiations of the contract between Ickes and Lewis, all of them were carried over, and it was not until April, 1945 that a contract was negotiated between the miners and the operators because the Government was doing the negotiating from the time the Illinois agreement was submitted and the Ickes-Lewis agreement — the agreement made with the Government, and the contract on its face specifically carried forward these provisions..

I will be glad to go over it with counsel.

The Witness: May I —?

Mr. Combs: Yes, Mr. Owens.

The Witness: In the 1945 agreement negotiations 2617 between the Southern Coal Operators Association and the Northern Coal Operators Association in national conference, there was inserted that same clause, and it is Section 14 in the 1945 agreement.

Mr. Combs: On page 54 of Exhibit No. 77.

The Witness: Number 14 in the 1945 agreement signed by all the coal operators, north and south. It was signed by Senator R. Burke, a distinguished senator, who was employed by the Southern Coal Operators and was their representative in the conference.

By Mr. Combs: ..

Q. You say that appears in the 1943, and it is your recollection it appears as I read it in the 1943 Illinois agreement? A. Yes, sir.

Q. And the first agreement that was negotiated 2618 by the mine workers after this Illinois agreement with the operators that this was inserted, this paragraph 24 of the 1945 Bituminous Coal Wage Agreement?

A. Same language; yes, sir. ..

Q. I direct your attention to page 108 of Exhibit 77, a provision of the 1952 contract, and I want to read that provision.

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"Application of contract to coal lands. As a part of the consideration for this agreement the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

Now, Mr. Owens, was this provision here, now, that I have just read in the 1952 contract, was that carried over in the successive amendments to the 1950 contract up to and including the 1958 amendment to the 1950 contract? A. I believe so, sir.

Q. Was there any change in the wording after the 2619 1952 contract? A. Not until — no, I don't think so.

Q. In this particular clause. A. No.

Mr. Rowntree: If your Honor please, the 1952 language I think is important to show what change was made in 1952 from the preceding language.

Mr. Combs: Would counsel like to ask the witness, it is certain all right with me.

By Mr. Rowntree:

Q. Mr. Owens, would you tell us what language was added to this land leasing provisions in 1952? A. Well, the difference is as he read in the 1945 and 1952. He read the two sections. That is the amendment to it.

Q. And is it not true that the following language was added to the subterfuge provision that previously existed, the following language:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or ac-

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quired during its term which may hereafter (during the term of this agreement) be put into production."? A. Yes, sir.

By Mr. Combs:

Q. I would like to ask you, Mr. Owens, the purpose that the union had in asking or negotiating with the operators to put this provision in the contract, the land leasing provision? A. For 75 years or more coal operators in some section of the production in the country would sign an agreement stipulating the tonnage rate and the wages provided for in the contract for their employees.

The contract was hardly — the signature was 2621 hardly dry on the contract and they would go back and they would subcontract sections of their mines to individuals or two or three men. Then those two or three men would insist on employing what they called laborers and get men to work, contending it was in conformity with the contract, to work for less than what the contract provided for.

• And the abuse became so aggravated that it became sort of a cancerous sore in the industry among our men that the operators would sign an agreement then as a subterfuge they would lease or subcontract a section of that mine, or some other mine, to one man and insist that they weren't under contract for that section of their property and they weren't responsible legally as a contractual party to the agreement, and in order to require the industry or the operator to carry out the terms of the contract we wrote such a clause in the agreement — insisted upon it, demanded it.

Q. Did the operators resist it? A. They resisted it.

Q. Have they resisted it at each contract? A. In every conference we discuss it they resisted it.

Q. Do you recall —

The Court: Just a moment.

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Mr. Rowntree: If your Honor please, I am afraid that this case is hard to follow — I know it is hard to follow. I would like to clear up this point right here at this time.

The Court: You have a right to do that, and your adversaries have a right, and you need not apologize about it.

By Mr. Rowntree:

Q. Mr. Owens, isn't it true that the purpose you have just discussed was a purpose to avoid subterfuge. A. To repudiate their contract.

Q. And that was the purpose in putting the subterfuge language in the 1945 and the prior Illinois contract. A. I don't follow you, counsel.

Q. That language pertained to subterfuge, did it not? The language — the earlier language that was discussed. A. Counsel, the word "subterfuge" is inserted in the agreement ---

Q. Yes, sir. A. --- as a charitable word in phraseology instead of accusing them out and out for doing what we know was violating the agreement and repudiating the contract.

2623 Q. I agree no one should repudiate the contract,

Mr. Owens. But what I am getting at is this: that the subterfuge language was the portion of this clause that relates back to 1945 and the earlier Illinois contract, and is it not true that the language that was added in 1952 does not have subterfuge language in it? It talks about leasing, that the contract will cover all coal lands whether then in production or later put into production. Isn't that right?

A. That is right.

2624 Mr. Combs: I would like to keep this completely straight now, your Honor. I want to point out to counsel the wording of this. I am following counsel — that sentence, in the 1952 contract, there is an additional sentence. It has different purposes, but I want to point out to

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the Court and to counsel that this says here — now let's read it:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement."

It is the operations of that, because obviously the union did not have members on land holding lease with no production in it. There is nobody there.

Mr. Rowntree: Thank you.

Mr. Combs: We concede that. We are following that. I am just going to ask the witness some questions on that. We are not right to say it is a subterfuge. There is an additional problem here.

Mr. Rowntree: Thank you.

By Mr. Combs:

Q. Mr. Owens, we were talking about the consideration of the first paragraph of the coal lands. I think you 2625 were following this here. Did a problem arise during the enforcement and the negotiation of these contracts as to whether or not that certain coal companies who owned numerous mines when they signed that contract, that claims came about that the contract only covered certain of those mines and the union was arguing that by signing the contract that he had agreed that it covered all of his coal lands in operation at the time that he signed the agreement? Is that true or not? A. We always assumed that.

Q. And is the purpose of adding this part to the application of the contract to coal lands to remove any doubt as to whether or not at the time that an operator signs his contract, he is signing it on the part of all of the mines that he is operating at that time or all that he operates within the life of the agreement, is that true? A. That is right, sir.

Mr. Combs: Just to make it clear so we won't have any confusion about it, I am going to read the last sentence. I

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read the first sentence of the application of contract to coal lands. Counsel is talking about subterfuge is dropped here.

The Court: I see it is getting alive. I see Mr. Kramer is on his feet.

Mr. Kramer: I just want to be sure, your Honor, that the jury understands and your Honor understands
2626 that the word "subterfuge" was not dropped in the 1952 agreement and that it continues.

Mr. Rowntree: We didn't say that.

Mr. Combs: Still reading from the application of contract to coal lands, the second sentence, Exhibit No. 77, page 108: "The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

So that "subterfuge" still appears in the 1952 contract, and I believe the witness has testified that the 1952 provision was carried over in each succeeding amendment to the 1950 contract and was a part of the 1958 agreement.

By Mr. Combs:

2627 Q. Is that right? A. Yes, sir.

By Mr. Combs:

Q. One more question, Mr. Owens, in regard to his land leasing provision in the contract. Was there any purpose on the part of the union to use this clause for the furtherance of an agreement or understanding with coal operators, or any person, to use this to gain control or to dominate the employees in the industry or to eliminate the small coal operators from the industry? A. No, sir.

Q. I believe you have testified that the purpose was to protect the miners or your members that you represent, to protect their standards that they had obtained in their contracts? A. Solely. We just represent the coal miners who we were negotiating the contract for.

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Mr. Combs: Now I would like to refer to the 1950
2628 contract as amended in 1958, and reading from Exhibit 77, I would like to read this part of the clause, your Honor. Part of it has already been read in the record, but I would like to read this particular part.

The Court: Which contract is that?

Mr. Combs: This is the 1950 contract as amended December 1, 1958, so it is the 1958 contract:

"The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work established by this contract. The parties recognizing their obligation, each as to the other, to exercise all possible efforts and means to obtain these objectives further agree as follows:"

And then there is considerable more in the clause that I will not read at this time.

By Mr. Combs:

Q. Mr. Owens, I believe that this particular clause first occurred in the 1958 contract, is that correct? A. That is right, sir.

Mr. Combs: Now in substance, this clause, your
2629 Honor, if I can summarize this, in substance this clause provides that the operators signatory to the contract, that is the 1958 amendment to the '50 contract, will not during the life of that contract buy, process, sell, produce or handle coal produced at standards lower than the provisions of the contract applicable in 1958.

By Mr. Combs:

Q. Now, Mr. Owens, could you briefly tell the Court and the jury the purpose of the union in trying — first let me ask you this, Strike that, please.

First let me ask you this. Did the union insist upon this clause to the operators? A. Yes, sir.

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Q. Did they negotiate in the conferences? A. Yes, sir.

Q. Did the operators resist? A. They resisted it as much as they could, in every way they could.

Q. Would you briefly tell the Court and the jury the purpose of the union in insisting on a clause of this character in the contract? A. Well, it is a continuation of our efforts over a period of years to have an agreement that would be applicable to the interests who negotiated the contract with us and signed it in good faith. We have labored 2630 under the impression always that a contract entered into in good faith should be carried out.

Our experience over the years, every succeeding contract and its duration built up an experience with us that was responsible for us insisting in season and out of season that the negotiators representing the coal operators insert a clause in the contract that would prevent them from in reality vitiating the agreement by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages, and it was a conclusion after all these years of experience. First, without any requirement as to — as far as language is concerned, we took them at their word that they were signing the agreement. It applied and would be applicable until it expires. And after years without any clause of that kind in the contract, we inserted it as it was read here, the 1943 clause in the contract. We had experiences with it. 1945 contract was inserted in there. We had experiences with it, and on through the life of all of the agreements we negotiated.

All we wanted done was the terms of the agreement be applicable to operators who signed the contract and their companies and their mines and the coal lands they owned.

So we argued and pressed for such a clause as here in 2631 this contract.

The operators resisted it. It wasn't retroactive. It was for the future. We recognized because it was a fact that there was mines under lease by the signators to this

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agreement, we knew that you could not violate that agreement if it was a valid agreement. We talked about the future, after the effective date of the contract.

Q. In other words, Mr. Owens, this provision was directed toward the problems of sub-contracting and contracting out of an operator after he had signed a contract that he would comply with certain wages and standards set up in his contract, is that right? A. That is right.

Mr. Combs: Now I read from Section D, your Honor, of the 1958 contract, an exhibit herein, No. 77, which reads as follows:

"Within one hundred and twenty days after the execution of this contract and each six months thereafter each operator signatory hereto shall certify in writing to the Joint District Contract Committee for the district where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract . . ."

2632 I point out, your Honor, that this amendment, the 1950 contract, was effective as of December 1, 1958, and that the clause that I have just read shows that the effective date of this particular clause would have been in April of 1950, the first effective date, 1959.

By Mr. Combs:

Q. Is that according to your recollection? A. That is right, sir.

2632A The Court: Now is that the union clause that you are talking about?

Mr. Combs: It is the protective wage clause.

The Court: It is the protective wage clause?

Mr. Combs: That's right.

The Court: Became effective when?

Mr. Combs: April 1959.

The Court: All right.

Mr. Combs: In other words, it shows on its face, Your

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Honor, that the amendment was effective December 1, but this particular provision in the contract, by its own terms, provided that it would not be effective until one hundred twenty days after the effective date of contract which would have been April of 1959.

By Mr. Combs:

Q. Now, Mr. Owens, I have asked you questions concerning provisions contained in the 1950 contract as amended up through and including 1958. I have asked you about the provisions concerning wages, the land-lease, the application of contract to land-leases, to the protective wage clause, and to the union security clause.

I ask you now if it was the purpose of the union to have — or agreement of the union — to have inserted in the contract these clauses for the purpose of eliminating 2633 any operator of any size, large or small, from the coal industry? A. No, sir, nothing could be further from the truth.

Q. Was the purpose of these provisions, as far as the union was concerned, to protect the wages and the standards and the working conditions of your members? A. Yes, sir, exclusively; have nothing to do with operating the mine, large or small.

Q. Now, Mr. Owens, I want to ask you some questions about the union's investments in the West Kentucky Coal Company.

We have exhibits here, but I believe they are on the table, so I won't refer to them. The evidence here, the records here show that the union invested in certain stock of Western—of the West Kentucky Coal Company. Can you tell the Court and jury about when these investments were made and why they were made? A. Well, I think it started in 1951, started lending money to Mr. Cyrus Eaton and his associates to buy stock in the West Kentucky Coal Company. Stock with stock pars attached to it was locked up in a lock box in the Bank of Washington as security for

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those loans. We invested some money in the stock, and we think it is a very good investment.

2634 The West Kentucky Coal Company, located where it is at, we think has a great future. It is reported to have a billion dollars of — or a billion tons of reserve coal. Well, if fifty per cent of it can be mined, marketed, twenty cents a ton in its raw state without river transportation and investments they got, without operating mines, with all of its equipment, but a billion tons of reserve coal, valued at twenty cents a ton, it would be worth a hundred million dollars, fifty per cent of it being recovered.

We think as a labor organization representing the coal miners, that if we can invest money in the industry that may be helpful, directly or indirectly, to the industry—the men that we represent in the industry—we think it is a sound investment.

Q. Mr. Owens, at the time, in 1951, that the union began buying stock and was beginning to loan money to Mr. Eaton and to others for the purpose of buying stock and taking the collateral, at that time those investments commenced, was the West Kentucky Coal Company a signatory to a wage agreement with the Mine Workers. A. Later it became signatory to the miners.

Q. I mean were they at the time that you commenced the — A. 1951, no.

Q. You say later on, when did they become signatory 2635 to the contract? A. In '54.

Q. Now, during prior years, had West Kentucky ever been under contract with the United Mine Workers of America? A. No, sir.

Q. And how long — do you know how long that coal company had been in operation? A. Sixty-five or seventy-five years, I think.

Q. And about how many employees did they have, approximately? Would you have any idea? A. Well, I think that they had, oh, from twenty-five to three thousand em-

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ployees, maybe more than that in the combined operation — Nashville and West Kentucky.

Q. During the 1940's, do you recall whether or not that the Labor Relations Board certified the United Mine Workers as the bargaining agent for the employees of the West Kentucky Coal Company, and do you remember that the Supreme Court of the United States enforced an order of the Labor Board requiring the company to bargain in good faith with the United Mine Workers of America?

Do you recall that? A. I recall. I am not positive about the dates.

Q. You don't recall the details? A. No.

2636 Q. Now the West Kentucky Coal Company then, you say, executed the contract in October or sometime in 1954? A. I think that was the date. I am not positive about that exactly.

Q. And did the West Kentucky Coal Company later acquire the stock in the Nashville Coal Company? A. Yes, sir.

Q. And did the Nashville Coal Company become a party to the Bituminous Coal Wage Agreement after it was merged with West Kentucky? A. As West Kentucky, yes.

Q. Do you recall about what year that was? A. Well, it was right after they acquired the property.

Mr. Combs: I believe the records will show here, Your Honor, that it was 1955.

The Court: All right.

By Mr. Combs:

Q. Now, Mr. Owens, in connection with West Kentucky and with Nashville Coal Company, has the union in any way participated or tried to participate in the management of the West Kentucky mines? A. We have not had anything to do with the management of the West Kentucky mines, either directly or indirectly.

Q. You enforce the contract as to West Kentucky, the same as you do any other coal company? A. Yes, sir.

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Q. Has the United Mine Workers, or its officers, participated in any way with the policies of West Kentucky Coal Company with reference to its sales of its coal? A. None.

Q. Has the United Mine Workers, or its officers, in any way tried to influence the management of the West Kentucky Coal Company or the Nashville Coal Company as to selling coal to the TVA or to the utilities or to any other person? A. No, sir.

Q. Has the management of West Kentucky consulted the union or its officers in any way with reference to its sales policies? A. No, sir.

Q. Now, Mr. Owens, there is in evidence here in the record, an exhibit, that shows that the United Mine Workers in 1959 —

Mr. Combs: I would like to make clear, Your Honor, that we are asking this without waiving our objections, if it is all right, to the time, that is in '59.

The Court: Yes, sir.

By Mr. Combs: I think the exhibit will show, Mr. Owens, that at sometime in 1959, that United Mine Workers
2638 underwrote credit to the National Bank of Washington for the North Fork Coal Company. Do you recall anything about that? A. Yes, sir.

Q. Now, I think it is in the record—I won't try to hunt it—that they applied for a line of credit with the United Mine Workers? A. Yes, sir.

Q. And did they state the purpose—are you aware of the reasons that they— A. Well, I think everybody knows the condition that prevails in and around Hazard, Kentucky, Hazard field, and the North Fork Coal Company made application for a line of credit for a million, five hundred thousand dollars.

Q. National Bank of Washington? A. National Bank of Washington. We bought a certificate of deposit, one million, five hundred thousand dollars, and the line of credit was granted to them for the purpose of trying to develop the

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industry in that section so that it would relieve the distress that was publicly known—almost every citizen in the United States.

Q. Did the union or its officers have any understanding with North Fork Coal Company as to what leaseholds it would acquire or production facilities it would buy? A. None at all.

Q. Did the union or its officers, any of them, have
2639 any knowledge of any leases that North Fork may have sublet? I make specific reference to a lease of the Kentucky Oak Coal Company. Did you have any knowledge of that? A. No, sir.

* * * * *

2641 Q. Mr. Owens, do you recall when the union began acquiring stock in the National Bank of Washington? A. I think it was in March, 1949.

Q. Would you tell the Court and jury, briefly, the manner in which the stock was acquired; what happened and the purpose of the union in acquiring this stock? A. The National Bank of Washington was a small institution, one of the oldest banks in our Capital. Great patriots of our great government had deposits in that bank back in 1808 and '09.

Q. I believe the record shows it was chartered by an Act of Congress, is that true? A. Yes, and for some reason or other it became known that the stock could be acquired. In fact, other banks, other groups of banks in the city of Washington were trying to buy the stock.

The United Mine Workers through that this bank was a good investment. We knew that our great capital was going to grow. It is now recognized as the capital of the world, and it is going to grow by leaps and bounds, and any investments in banks, we believe, in the city of Washington will increase in value. So we simply bought stock in that bank as an investment, and the bank became the depository bank for the funds of the United Mine Workers, and it has

grewed until it is the third largest bank in the city
2642 of Washington.

Q. Did this National Bank of Washington acquire the Hamilton Bank sometime in the course of its business?

A. Yes, sir.

Q. Do you know how many branches the National Bank of Washington has in Washington? A. I think it is twelve now.

Q. Twelve? A. I think it is now—eleven or twelve.

Q. Is the business of the bank restricted to the District of Columbia? A. I think so, sir. Yes, sir. I think so.

Q. Mr. Owens, does the union have a majority of the directors or the officers in the National Bank of Washington? A. No, sir.

Q. Does the union or its officers attempt to influence or control the policies of the business of the National Bank of Washington in any way? A. Neither Mr. Lewis, Mr. Kennedy or I, and now Mr. Boyle, who is an executive officer of the United Mine Workers, have anything to do with it.

Q. Are any of the officers of the United Mine Workers, that is the officers of the International Union, United Mine Workers, are any of them directors or on the Board
2643 of the National Bank? A. No, sir.

Q. Is it your information that this bank is governed by the Federal Reserve System? A. Exclusively; yes, sir.

Q. Mr. Owens, has the United Mine Workers, or any of its officers, underwrote any credit for anyone at the National Bank of Washington with the purpose or the intent to eliminate any operator, large or small, from the coal industry? A. No, sir.

Q. I believe you testified you started working in the coal mines when you were 10 years old? A. Yes, sir.

Q. And that you became a member of the United Mine Workers when you were 10 years old? A. Half member at that time.

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Q. Did they have half members at that time? A. That is the only way I could. Half member.

Q. Is that because of your age? A. Because I was only 10 years old. All boys were admitted as half members at that time. It took two of us to make a member.

Q. Now I would like for you, briefly, Mr. Owens, to state to the Court and jury, from your long association with the United Mine Workers as a member and as an officer, 2644 the policy of the United Mine Workers as it affects mechanization of coal mines, the use of machinery in the coal mines

I would like for you to be as brief as you can, but I would like for you to hit the high spots of the policy of the union and the history of mechanization in the coal mines. A. The history of modernizing a coal mine dates back —

Q. I think, Mr. Owens, without interruption, I think it would be easier for the jury to follow you if you would first state the policy of the United Mine Workers now and as it has existed over the years with reference to mechanization of the mines. A. The policy of the United Mine Workers of America has always been that we have nothing to do with the management of the mine, directing the work force, hiring or discharging of the men—that we will not abridge it—the purchasing of equipment, the installment of it in the mine, is invested exclusively in the rights of the men who operate and own the coal mine. And the Mine Workers union has never interfered with the installment of any machine or any equipment that the owner of the coal mine believed that it would be for the best interest of the corporation or bring more return for the investment they had in that mine.

2645 If we did it would be interfering with the right of capital to invest its money. It would be contrary to the very principles, as we understand it, of free enterprise, the right to invest your money, the right for return on the investment.

The only thing that we have insisted upon or requested that we participate in is a sort of a three-way participation. That the men employed by the company, the public who consumes it and the operator who installs it, all participate—us by wages, the public by the reducing of the production cost, and the investor by increased production which increases his profit.

We have never interfered with that. We think it is a fundamental American principle that if it is interfered with, retired by any segment of our people in the country, it will affect the security of our great nation in competition with forms of government that installs them at will and increases their production in every line of endeavor until it will overwhelm us and make our country, its ideals and institutions, in greater jeopardy than they are today.

Q. Mr. Owens, in connection with that, when you started working in the mines, would you tell the Court and jury, briefly, just how the coal was mined. I take it it is hand loading? A. All hand loading, so much a ton.

2646 Q. How was the transportation? A. All transportation was mules. Had some road haulage, what we call dillies, and some of it was pick mine.

Q. What kind of work did you do when you first started? A. I first started, attempted to try to load coal in the mine, but I couldn't load very much. Next I became what they call a trapper boy in the mine, opening and shutting the door for ventilation purposes.

Q. Did you ever drive a mule? A. Then later on I became a mule driver.

Q. I believe you testified, and I don't want to get into anything personal; but I believe you testified that you lost your right leg. How did you lose that? A. Well, I went into a trap door.

Q. Were you driving a mule? A. Driving a mule. No safety regulation at that time. There wasn't any catch on that trap door.

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Q. Did they undercut the coal? A. They were undercutting it then with a machine.

Q. How was ventilation put into the mine? A. Well, the ventilation was regulated, of course, with a fan from the outside and regulated by these doors these kids worked at or boys worked at. Sent into various sections and turned through the mine.

2647 Q. Now later on on the mechanization, and I would like to travel about 10 year periods on down— A. All right.

Q. Later on how was the coal cut for loading? A. It was undercut.

Q. By machines? A. Yes.

Q. And how was it transported to the surface? A. Well, later on it became motors and displaced the dillies in the mines. They displaced the mules in the mines from gathering it to what we call—get on gathering switches. Mules gradually went out. Motors came in. Now they have got what they call buggies and conveyors, displacing motor transportation in the mines.

Q. On the transportation, at the time that the transportation became by motor and undercut by machine, did they continue loading the coal by hand? A. Yes. They loaded—shot the coal down mostly with black powder, loaded it with a shovel into cars.

Q. Commencing about World War II, do you know about what percentage of the coal was loaded by hand and what percentage was loaded by machine? A. In 1940?

Q. About 1940. A. I couldn't give you the exact
2648 figure without looking at the record.

Q. Just approximately A very little mechanization south of the Ohio River, outside of what strip coal was being mined in 1940.

Q. Do you recall about what the average tonnage was mined by the average miner per day at that time? About 1940? A. About $4\frac{1}{2}$ or 5 ton per man.

Q. Now after World War II, say in 1948, '49 and '50, do

you know about what percentage of the coal was mined by mechanization and what by hand loading? A. Well, it gradually increased. The mechanization increased til it has gotten now there is only about 36,000,000 tons mined by hand in 1960 and all the rest of it mechanically operated.

Q. In percentage, would you know about what per cent? Would you say 84, 85 or what per cent is loaded by mechanical means? A. It is more—I think about 90½ per cent, maybe 91, mechanical.

Q. Mr. Lewis testified that as of now that the average—well, I shouldn't say. Well, he was in the court room, your Honor, as a party when the witness testified.

Mr. Rowntree: If your Honor please, we don't think the rule applies to these officers of the international union
2649 and he is privileged to point out testimony.

* * * * *
2650 By Mr. Combs:

Q. I ask you, Mr. Owens, do you have the latest figures or could you give the Court and the jury the approximate average production of the coal miner in the United States at this time? A. I can answer your question. In 1959 they produced 412,027,502 tons of coal. In 1960 they produced 413,000,000 tons, an increase of 2/10ths per cent. In 1959 the average production per man per day was 12.22.

Q. Do you have 1958? A. '59.

Q. Do you have 1958? A. No, I don't have 1958.

Q. From what source are those figures? A. These are taken from the Bureau of Mines, Keystone Bryhill Publication.

In 1960, I might say they worked 188 days in 1959; the average number of men working daily of 179,639. In 1960 there was 160,200 men, or 19,400 less, and they worked 180 days, eight days less than they did in 1959, and
2651 they produced approximately a million more tons than they produced in '59, on a daily average of 13.10 per man, per day.

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Q. All those figures come from the Bureau of Mines, federal? A. Yes. This is compiled by Broyhill Publication, branch of the Federal Bureau of Mines.

Q. Now, Mr. Owens, in connection with the mechanization of mines, commencing in 1950 through 1958, or at any other time, has the union or its officers made any agreement or had any understanding that they would aid any operator financially to mechanize his mine for the purpose of eliminating any operator, large or small, from the coal industry? A. No, sir.

Q. Has the policy of the union with reference to mechanization been consistent over the years that you have described here? A. As far as I know, year in and year out.

Q. And that policy was unchanged from 1950 through 1958 and is unchanged at this time? A. Yes, sir.

2652 Q. Mr. Owens, in 1954, did the United Mine Workers of America petition the Secretary of Labor to set a prevailing wage in the bituminous coal industry under the terms and provisions of the Walsh-Healey Act? A. Yes, sir.

Q. Did you participate in those hearings? A. Yes, sir.

Q. Were there others participating in the hearings? A. Yes.

Q. Would you describe to the Court and to the jury just briefly who participated in the hearings? A. Well, you mean representing the miners?

Q. Representing the mine workers and just who the participants were in the hearings before the Secretary
2653 of Labor. I believe it was in February of 1954. A. In the hearing before the referee or —

Q. Yes. A. Well, I think I testified, and two or three operators, and — I don't know whether Mr. Boyle testified at that time or —

Q. No, Mr. Owens, I don't care about who testified I just want to know the different groups. The United Mine Work-

ers participated? A. There were operators, miners, operators that were opposed to it and operators that were in favor of it, and the Mine Workers Union representatives.

Q. Were operators who were operating under the union, were they present and testify? A. Yes, sir.

Q. Do you remember about how long those hearings lasted? A. I don't recall the number of days, but it was a lengthy hearing.

Q. Did there come a time according to your recollection when the Secretary issued an order setting a prevailing wage in the bituminous coal industry for the first time? A. Yes, sir.

Q. That was sometime in 1955? A. Yes, sir.

Q. Do you recall whether or not that the District
2654 Court of the District of Columbia issued a restraining order prohibiting the Secretary from putting that order into effect? A. I think he did, and required a hearing under it.

Q. And then after the hearing, did the Court dissolve that petition? A. Yes, sir.

Q. That restraining order? A. Yes, sir.

Q. Now, Mr. Owens, why did the United Mine Workers participate in this hearing, or why, rather, did they petition for an order? Would you explain briefly to the Court and to the jury? A. Well, it was the law of the land, and it was simply a request made by the United Mine Workers that such law be made applicable to regions where coal was being — where coal was produced, so that governmental purchases be made in conformity with the prevailing wage in those regions, and after due hearing, why the order was issued, and it did — it is not only — that application affecting the bituminous coal industry, but other applications affecting other industry have been proposed, and in effect, and rightfully so.

Q. Now after the order was propagated in 1955, I believe,

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was that order amended later to increase the prevailing wage rate after a finding? A. Yes.

2655 Q. Now, Mr. Owens, was there any purpose, or was there any understanding or agreement on the part of the United Mine Workers that they intended to try to get the Secretary of Labor to set a prevailing wage for the purpose of eliminating an operator, large or small, or any operator, from the mining industry? A. No, sir, just the reverse is true. It was done for the express purpose; or requested for the express purpose to effect the wage standards and working conditions and safety regulations provided by law in the coal mines whether it was in a small operating mine by a small operator, or a large operator. We had no interest in the industry investment in petitioning them. We wanted to protect the wage standard of the men who worked in the mine, union or non-union.

Q. Now, Mr. Owens, has the United Mine Workers of America had occasion from time to time to criticize or to comment upon the buying or purchasing policies of the TVA? A. The most information we receive about the purchases of coal by the TVA is what is published in the press, when a letting has been made for certain number of tons of coal, and sometimes we see the publication. We have nothing to do with it. It is none of our business. They
2656 can sell their coal for whatever price they want to sell it. That is the prerogative of owners of industry. It must never be taken away from them, because if you do, that right of owning and operating a mine or an industry for profit, under our form of government will be inoperative, and the only thing that we are interested in under the Walsh-Healey Law, or under the consumption of coal by TVA or by any other consumer in America, that we want to see that the men who produce that coal and who are the only ones that we represent, that they get the prevailing scale as provided for in the contract which we think is an American standard that should be paid in the coal industry in this country. All we are interested in.

Q. Has the United Mine Workers or any of its officers ever tried to get the TVA purchasing agents, to try to influence them with reference to who they would buy coal from, or to favor any individual company in any manner?

A. No, sir.

Q. Now, Mr. Owens, part of the preamble of the constitution of the United Mine Workers was read in this record yesterday. It's an exhibit — I don't know just what the number of it is — but it is in evidence.

I call your attention to part of the preamble which reads as follows:

“We have formed the United Mine Workers of
2657 America for the purpose of establishing by lawful
means the principles embraced in the body of this
constitution.”

I ask you in connection with the objectives of the union that you have testified to, in connection with its activities I have inquired about, whether or not that you have tried to accomplish these means by lawful means or by means of
2658 violence or otherwise? A. We believe in that section without any reservations. All my life I have recognized that where law ends tyranny begins.

We are a government by law, and I believe that personal persuasion by conversation in presenting whether it be a question of joining a union or civic club, or a church, or a lodge, or the Grange, or any other institution that is recognized as being an asset to our country, can better be accomplished by conversing with them, consulting with them, and dealing with them in conformity with the law and not violence. That is our principle.

Q. I ask you, Mr. Owens, whether or not that the United Mine Workers or its officers have authorized or participated in or ratified in any way any act of violence against the Phillips Brothers Coal Company or any other coal company in the Tennessee area or anywhere's else? A. Not by specific action or in any other way, to my knowledge, and I

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certainly would oppose it if I had any information of it because it does not contribute anything to the welfare of the industry, the welfare of the United Mine Workers of America.

Violence leads to tyranny, leads to the destruction of law and order, and destroys our form of government if it is permitted to exist, and we have been opposed to it from our inception and anybody who is personally acquainted
2659 with us knows that is a fact.

Q. Now Mr. Owens, among the objects that were also read into the record on yesterday in this constitution, an exhibit in this case, I notice that the first of the objects is to unite in one organization all workers eligible for membership, employed in and around coal mines.

You have testified you have been a member of the United Mine Workers since you were ten years old. Has that been in force and has it been followed since you have been a member of the United Mine Workers and an officer of the United Mine Workers? A. Yes, sir. As long as I can remember the purpose of the United Mine Workers organization is to try to organize all of the coal miners eligible for membership excluding the managerial force, the directors of the work force or the executives of the company, into an organization that we may be able to unite in collective bargaining arrangements with the industry to regulate as far as wages are concerned, hours of employment, and safety in the coal mines in America. That is all we have been interested in, and that is all we are interested in now.

Q. Mr. Owens, has the United Mine Workers under its contracts with signatory operators or under its constitution or policy, has it ever tried to insist on who the employers would hire as their workers? A. Under our contract
2660 and under our policy, every member of the United Mine Workers of America since I have been a member of it, has been first employed by a coal company. He selects him regardless of his creed or color or nationality.

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He is not eligible to become a member of our union until some coal operator employs him, hires him, and we have nothing to do with it. He can hire anybody he wants to.

Q. And that is without reference to whether he belongs to the United Mine Workers or whether he does not belong to the United Mine Workers; is that true? A. He does not have to belong to the United Mine Workers. He can hire an Eskimo from the far north and employ him in his mine if he wants to.

Q. During your experience with the United Mine Workers as a member and as an officer, has there ever been a time when the United Mine Workers had anything to do with who would become a coal operator or how he would operate his mine? A. Counselor, the purchasing of coal acreage, the location of his tippie, the sinking of a shaft or a slope, what kind of track or conveyance, or machinery, or any part of a coal mine, that the United Mine Workers has nothing to do with.

We recognize that we just represent the employees
2661 that he selects to work in his mine.

He can buy a 70-yard stripping shovel — we would have nothing to do with it. He can buy a 10-ton motor; he can buy a 50-ton motor; he can buy a hoist that may hoist 10 tons of coal up a shaft in one trip — we have nothing at all to do with that.

We recognize that that is a prerogative of the owner of the mine. It is his money, he invests in it and he can start a small mine, he can join with others that he may entice into a corporation and have a larger operation. He may sell stock in that company? That is his right under the law and we don't attempt to abridge it.

And, counselor, that is the trouble with the British production that only produces 1.23 tons per man until it got so bad the government had to take over the mines and they almost collapsed at the end of the war standing on billions of tons of coal because there wasn't enough foresight con-

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nected with the industry that pointed out to them that if they wanted to live they had better modernize their mines and increase their production.

Q. Another objective, Mr. Owens, that I would like to ask a question about, I notice it was read in this record yesterday, the fourth objective is to strive for a minimum wage scale for all members of our union.

2662 Was that an objective when you first became a member of the union? A. It has been one of our objectives which we believe that if a — well, to make it a home illustration, we believe that if a man is working on a machine in the State of Kentucky that he ought to receive the same wage that a man working on the same kind of machine in Pennsylvania or in Tennessee is getting. Nothing unusual about that. It is done by Congress in their wages. It is done in the public utilities regulating the power rates. It is done by the interstate commerce regulations of the freight rates. It is done by the Agriculture Department with the authority of Congress in regulating wheat, cotton, tobacco, and a hundred and one other things.

2663 Certainly it can't be a violation of the law to have the ambition that you represent men that they all receive a minimum wage, so that they can exist under an American standard of existence, and that is one of the objects of our union.

Q. Now, Mr. Owens, I want to ask this question. Commencing in 1950 and up through 1958, or any other time, has the United Mine Workers, or its officers, agreed, conspired, or have they through concerted efforts in conjunction with the Consolidation Coal Company, Peabody Coal Company, the Island Creek Coal Company, the Pittston Coal Company, Pittsburgh Midway Coal Company, West Kentucky Coal Company, the Nashville Coal Company, trustees of the United Mine Workers Welfare and Retirement fund, conspired with those named corporations and companies, or with any other company or corporation to

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eliminate the small operators or any other operator from the mining industry? A. No, sir.

Mr. Combs: You may ask him.

CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Owens, on your direct examination this morning you spoke of the portion of the land lease clause, as it has been called here, as having been in the 1945 so-called Illinois agreement, I believe.

2664 Mr. Combs: 1943.

By Mr. Robertson:

Q. 1943 Illinois agreement, and I believe one additional agreement. A. 1945 I said.

Q. 1945. And I believe it was pointed out at that time that in those earlier agreements that the provision read: "The said operators agree that they will not lease out any coal lands as a subterfuge for the purposes of avoiding the application of this agreement." Is that correct? A. I think that is substantially right, sir.

Q. And I believe that it was the purport of the testimony this morning that in the 1952 agreement that provision was carried forward in the '52 agreement, but had added to it this provision: "As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement; or acquired during its term which may hereafter during the term of this agreement be put into production." Is that correct? A. I don't follow your reading of it, sir. You have a different contract there.

Mr. Robertson: Will you stipulate?

Mr. Kramer: Oh, yes.

2665 Mr. Combs: We were following it.

Mr. Kramer: That is not quite all of it.

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Mr. Robertson: I think I read it all. I read the last sentence first and asked if that provision was carried forward in the '52 agreement and then the first sentence I read was added to it.

By Mr. Robertson:

Q. Mr. Owens, is it a fact that that provision that was added to that '52 agreement does apply to any properties which are acquired by a company after the contract is signed, even if those mines, after acquired, are already
2666 represented by other union members, members of another union? A. No, sir, not unless the procedure covered by law would change the status of an agreement that was in effect, because it wouldn't be a valid contract.

You have in mind that a company is recognizing some other union during the existence of this agreement, that the condition may change in conformity with the law, and the employees of that mine exercise their right under the law, and we proceed to consummate an agreement under the law, and the question of its validity can only be determined by the procedure prescribed by the law to invalidate it or validate it, not what the contract says or what you say. The law supersedes the contract.

Q. Do you agree, Mr. Owens, that the employees at these mines have a right under the law also? A. Exclusively. They have all of the right and we want them to enjoy it, without reservation.

Q. Mr. Owens, I point out a letter, an exhibit in this record, from Mr. Hugh A. White, president of District 12, United Mine Workers of America, dated July 10, 1957, addressed to Mr. H. C. McCollum, Peabody Coal Corporation, 8615 so forth his address:

2667 "You are hereby formally advised that the joint Bituminous Coal Wage Contract to which the Peabody Coal Company is signatory, is effective at any and all mining operations operated by the signatory company. Full compliance to the terms of the aforesaid agreement

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is expected from the Peabody Coal Company by the United Mine Workers of America."

Now that was in regard to the purchase by Peabody, after they had signed this UMW contract, of Midwest Radiant Corporation and Perry Coal Company, whose employees were represented by the Progressive Mine Workers of America. Does this not indicate that this provision in the contract automatically took the rights of the employees of those two coal companies at the time they were purchased by Peabody Coal Company? A. It has no bearing upon the terms of the contract at all, because of, the language of the contract supersedes any written communications between the Peabody Coal Company and Hugh White as president. He is not the executive officer of the United Mine Workers organization and he is only a part—the mine workers is only a party to the contract and the only way the question of a contract could be enforced is by joint action, the operators and the miners. And the operators might write a communication or the miners may, but it has no compelling force in changing the terms of the contract, because the contract speaks for itself, and the law, counsellor, if you please, the law determines the eligibility — and eligibility of them being members of the Progressive Miners Union or the United Mine Workers, and the procedure to determine that is provided by law, not by this case.

2668 Q. That is absolutely correct, Mr. Owens, and I will ask you if this letter from Mr. White does not represent the interpretation by an agent of the United Mine Workers of America of this land lease clause? A.

2669 Well, I don't know the—what you mean by does it represent the position of the negotiators in the —

Q. He points out to Peabody that the wage agreement covers all mining operations operated by Peabody Coal Company, and this provision, this land-lease provision, is it not, is the part of the contract which makes that applicable? A. When they signed the agreement, they signed the

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agreement for the Peabody Coal Company, but now you are asking me on an acquired property subsequent to the consummating of the agreement is covered by the contract when they signed it.

I say to you, sir, that the question of their right, the miners and the coal operators, is provided for under the law, National Labor Relations, may determine that and from them to the Courts and so it is a procedure of law. If there is a dispute about, it will be adjudicated by the law, not by what we say, because the Courts will determine that, after full hearing presented by both sides, and it is just an assumption on his part.

But regardless of what we say is in the contract, the Mine Workers believes in law and order, and we never signed an agreement in our lives that we didn't know that the law superseded the terms of that contract, and if there is anything in it in violation of the law, then the law takes precedent to the contract, and we abide by that decision.

Q. Now, Mr. Owens, you are talking about the UMW contract with Peabody Coal Company. A. Any contract.

Q. Now the employees of these two mines, the Millstadt and the St. Ellen mines that we are talking about, were under contract with the Progressive Miners of America, and yet here is the United Mine Workers of America taking the position that simply by the acquisition by Peabody Coal Company of two smaller companies, that that automatically terminated the rights of those employees to belong to the Progressive Miners of America. A. Well, now —

Q. Isn't that correct? A. Counsel, no. You are taking that position. You are saying that we do.

Q. Mr. White is saying that you do. A. Well, Mr. White is not the United Mine Workers.

Q. Isn't he a district president? A. Yes, sir.

Q. Are district presidents the ones who deal in the field with the companies in the negotiations of contracts? A.

Yeah, but he might be misleading, he might misunderstand what his rights are under the contract, and the question of a dispute may rise under it, just like the company might write Hugh White a letter and say that the terms of the contract is so and so, but because the company says that, it is a question of adjudication under the terms of the contract, first.

And if it is a question outside of the terms of the collective bargaining, why the law takes precedent of it, over it, has nothing to do with it. In other words, Peabody Coal Company may write President White and say that their King Mine wasn't covered by the contract. High White might say that, "I believe that it does cover their contract," but the fact the contract provides how that question shall be adjudicated with the councils of the group provided for to adjudicate it.

But if it is a question outside of the terms of the contract, why the law takes precedent, they determine it, and that is what will be done in this case, and that is what is being done.

Mr. Combs: If the Court please, just strictly for clarification—counsel said he was through asking on that.

I think for clarification of Court and counsel on the question that was asked about is questions of stipulations that we have entered into here.

Now counsel has stipulated on both sides, we have, that these letters were written by Hugh White, replies were made thereto. At the time that the letter was written, there was an organizing campaign going on there, and the rest of the record will show that Hugh White was claiming that we represented the majority of those men there.

Then we have a stipulation that the Labor Board heard the case and there was a Court decree by the Chicago Circuit, so I don't want to be misunderstood about the Mine Workers' position on that, which I think is clear in this

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matter, that only when the majority of the men designate the Mine Workers to represent them, do they have a right to represent them regardless of the contract or anything else.

Now one more thing about the stipulation in regard to this contract that the company had with the Progressive Union. We stipulated also that there was nothing wrong on either side with the company terminating that contract. The Court so held, because it was terminated according to the contract terms, and all of this happened after the termination date of the contract between Peabody and Progressive Union.

Since that is a matter of stipulation between the parties,

I thought I would like to have it clear at this point.

2673 The Court: All right.

By Mr. Robertson:

Q. Mr. Owens, moving on to another subject, I believe you testified this morning concerning the union shop provision of the contracts up through the 1948 wage agreement.

It was my understanding that the United Mine Workers had a union shop agreement up until the signing of the 1950 contract. Was that your position? A. Counsel, we never had so-called closed shop agreement, it never —

Q. No, not closed shop, excuse me, union shop. A. Union shop. The question never arose in our joint conference until I think about '41. We always assumed that if a man was a coal operator and was negotiating with us, and we represented his men a hundred per cent, and he signed a contract, that he signed a contract to cover for the duration of that contract all of his employees.

We labored under the impression that we represented them all, and if he entered into an agreement why naturally it covered all of his employees. We never raised the question in the conference, and they never either until I think along about '41.

After all of these years, after fifty years, the question arose down in some mine in West Virginia, and then is when we tried to write a clause in the contract that
2674 would be in conformity with the law, and from then up until the present time, we tried to write a clause in the contract that would protect the men we represented to the extent and only to the extent as provided for by law, and if we and the coal operators sat down and wrote a clause, and inserted it in the contract, that later proved to be a violation of the law, we recognized that the law took precedence over that section.

2675 By Mr. Robertson:

Q. You have testified, Mr. Owens, about the making of the agreements, and I wanted to ask you, this so-called provision here what was intended by it, and that is the provision that was added on to the requirement that employees be or become members of the United Mine Workers "to the extent and in the manner permitted by law." Where was this clause intended to apply? A. To the terms of that contract.

Q. I beg your pardon? A. To the terms of that contract.

Q. Where geographically was this union shop intended to apply? A. To every operator who was signatory to the agreement.

Q. Regardless of where— A. Wherever the operator signed a contract we assumed it applied to him.

2676 Q. Are you aware of the fact that the Taft-Hartley Act prohibited a union shop clause unless the union was in compliance within the preceding 12 months with the reporting provision of that statute? A. We complied with the Taft-Hartley Act, sir, in all of its provisions as provided for by the law.

Q. You mean you have complied— A. With the Taft-Hartley Act.

Q. With the non-communist affidavit provision of the Act,

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requirement of the Act prior to the Landrum-Griffin Act of 1956, is that your testimony here? A. I didn't say that. I said we complied with the Taft-Hartley Act. It wasn't compulsory for us to sign it. That section was inserted in the law — pardon me, I don't want to abridge the order as it applied by law.

Q. It was compulsory though if you had a union shop provision in the contract? A. We never contended only as it applied by law.

Q. But the employees could not become members, could not be required by contract to become members unless — A. If it was a violation of the Taft-Hartley Act it was inoperative, or any other law.

Q. Are you saying that you were operating above the law? A. I told you that if it was a violation of the 2677 law it was inoperative. It wasn't the — the language simply says that if it is a violation of the law, within the law. I don't know of any other language you could write in it.

Q. So that you concede that this provision in the contract was illegal? A. No, sir.

Mr. Combs: May it please the Court, I think that the question of counsel with reference to the application of the law, the interpretation of the law, I don't think is proper cross examination to this witness here.

He can ask him any factual —

The Court: No, the interpretation of the law is not within the purview of any witness. The attorneys and the Court have enough difficulty with interpretation of the law rather than calling on the witnesses to interpret the law.

Now the cross examination includes a broad range. I am permitting counsel to ask certain questions to test the standards of the witness in making his answers. But when you object to the question to this witness as interpreting the law, the Court sustains the objection, that that is not

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a proper question. I sustain it.

2678 Mr. Robertson: May it please the Court, on the prior objection I am trying to ask the witness his interpretation of the contract rather than the law. He has testified as to being present in the contract negotiations. I feel like that we have a man here who can shed some light on it.

The Court: The Court did not intend to cut you off, Mr. Robertson, from your cross examination. You are entitled to cross examine fully. If you want to read to the witness from a particular provision in the contract and if there is any dispute about the meaning of it, or about it, how it was interpreted by the parties thereto and as a matter of testing the knowledge of this witness, I will let you ask.

Of course, the interpretation of any witness of the provisions of the contract may or may not be persuasive to the jury or to the Court, but the jury may consider the interpretation along with all other circumstances relating to the contract for whatever it may be worth.

By Mr. Robertson:

Q. Mr. Owens, let me ask you this: "It is further agreed that as a condition of employment all employees shall be, or become members of the United Mine Workers of America." That provision standing by itself, how do you
2679 interpret that provision that I have just read? A.

You ask me to interpret two lines of a context of a contract covering a single subject.

Q. Well, let me ask you this: Can you interpret that? A. No, I can't interpret it that way, sir. I want to be responsive to counsel.

Q. May I ask, I believe this language, this entire language, including the provision "to the extent and in the manner permitted by law" was carried in the contract for approximately eight years. I believe it is still in the contract but it was carried in the contract during the eight years, sir, that the union shop clause was illegal unless

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the reporting provision of the Taft-Hartley Act had been complied with by the union.

May I ask, did the United Mine Workers ever intend to comply with the provisions of that Act?

A. We did comply with the Taft-Hartley law, and nobody has ever questioned it — no court, no operator, no executive of the federal government, state or anywhere else.

Mr. Combs: If the Court please, I point out that counsel has stipulated on that subject. We have stipulated that during the period in this lawsuit that we were not in compliance with the so-called reporting provisions of 2680 the Taft-Hartley Act and we did not have to be in compliance, and we stipulated to that. As far as we were required to, we did comply.

By Mr. Robertson:

Q. Mr. Owens, I will ask you if this matter of complying with the Taft-Hartley Act was not a very important question in 1948 when the United Mine Workers was still affiliated with the American Federation of Labor? A. You mean the question of requirement under the law?

Q. Whether or not the United Mine Workers would comply with these provisions of the Taft-Hartley Act, the reporting provisions? A. Counsel, I am trying to inform you that the United Mine Workers executive officers and the union itself did comply with the Taft-Hartley law and nobody has ever accused us of not complying with it, and to imply that we did not comply with it, I am denying that without elaborating on it.

Q. All right. A. And I can, if you want me to.

Q. I will refer to the stipulation that they were not in compliance with the Taft-Hartley Act —

Mr. Combs: Wait a minute.

Mr. Robertson: I am sorry.

2681 Mr. Combs: He didn't intend that —

Mr. Robertson: But were not in compliance with the reporting provision of the Act.

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Mr. Combs: That is right.

By Mr. Robertson:

Q. Mr. Owens, I want to read to you a portion of a speech made by Mr. Lewis at the 1952 convention of the United Mine Workers, at page 339, where he is speaking here of the split of the United Mine Workers of America from the American Federation of Labor, and he states:

"It is unfortunate indeed that the convention of the American Federation of Labor in San Francisco, shortly after this statute was enacted, did not accept the advice of the United Mine Workers given to them at that time and withdraw from any association with this Act and refuse to sign the anti-Communist oath. If labor had just enough brains in its leaders, just a small amount of brains at that, the Taft-Hartley Act would have fallen by default and would have been long since repealed by a Congress that would have recognized its futility to bind free men in chains at the behest of the National Association of Manufacturers, operating through its supine tool, Robert Alphonso Taft.

2682 "Even now, if the leaders of the American Federation of Labor and the leaders of the CIO had had the courage of a long-eared jack rabbit looking at a red bone hound they would withdraw their anti-Communist oaths and let this damnable statute fall now by default.

"But I don't know how to pump any courage into the veins of these syncophants who are willing to sell out the destiny of the labor movement and the future of its millions of members and their wives and families in this country for a lousy lunch or a pat on the back from some pseudo-politician in Washington. The day will come when they will rue their own cowardice, and the day will come, if this Act continues to prevail, when the rank and file of organized labor will repudiate a leadership born in weakness and conducted upon the premise that they must consistently act respectable and in a manner that brings a

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smile and the compliments of the politicians of the country who are servants of the economic masters of the country."

Mr. Owens, was that representative of the opinion of the United Mine Workers of America as to compliance with the Taft-Hartley Act? A. You read that from the proceedings of the mine workers convention, didn't you?

2683 Q. Yes, sir. A. I have no—you are asking me whether it was said or not?

2684 Q. I am asking you if that was the mine workers' opinion as to its compliance with this act?

Mr. Combs: May it please the Court, I have no objection if counsel is trying to test the witness' knowledge or his memory on anything, but we have stipulated, we have conceded that the United Mine Workers, through Mr. Lewis, throughout—and Mr. Lewis has testified to that—throughout the time that the reporting provision was in the Taft-Hartley Act that the mine workers did not elect to comply with that. They never did. And the Congress repealed it.

Now I have no objection, if counsel is trying to test the witness' memory or knowledge at all, but I just don't think it is proper cross examination to keep pounding on something that we have stipulated to.

The Court: Can you tell me the purpose of that question, Mr. Robertson?

Mr. Robertson: Your Honor, here is a provision in the contract which admittedly before this last little clause was added to it, was a union shop provision. Taft-Hartley outlawed union shop provisions unless the union was in compliance with the reporting provisions of the Taft-Hartley Act.

Now it is claimed on the part of the union that this
2685 little phrase on the end saves this clause and does not make it a union shop provision.

Now the only way that it could possibly save it, that I can see, is that if they some time in the future comply with these reporting provisions of the Taft-Hartley Act, then

this provision, this union shop clause could legally come into operation, and I am reading this to show —

The Court: What I don't understand, with due deference to you, Mr. Robertson, what pertinency it has to any of the issues here. They stipulated to all those matters, and if it is a union shop clause and somebody violated it, that would be an employer-employee matter; whether it involves an unfair practice or not; whether it is a violation of any of the contracts. Those are matters, as I understand it, exclusively within the jurisdiction of the Labor Board, with which this jury and this Court has nothing to do.

I understand the point. It is your contention that the union didn't file the anti-communist oath, didn't file statements of the expenses or what certain people in the union were drawing as salary, or didn't comply with that provision, which has been before this Court before, and since it didn't, then that union clause in that contract prevailed. If it did, it would not have prevailed.

But what does that get us to? Does it decide anything in this lawsuit? If so, if you will let me know, I will try to pass on it.

Mr. Robertson: Yes, your Honor. There is no question but what that set of facts constitutes an unfair labor practice over which this Court has no jurisdiction.

The Court: All right.

Mr. Robertson: However, the same set of facts is a part of this conspiracy in violation of the anti-trust laws. The imposition of this contract.

The Court: I understand that.

Mr. Robertson: And the facts which happen to constitute an unfair labor practice may also violate some other statute, and we are contending here that these set of facts, even though they constitute unfair labor practice, they also constitute a violation of the anti-trust law.

The Court. It is or was a circumstance that the jury may look to in determining it.

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Mr. Roberts: That is right:

The Court: I understand that, but the trouble with all that, as I understand it, these gentlemen have stipulated to everything that you are undertaking to cross examine this witness about.

Haven't you stipulated to those matters?

Mr. Combs: Yes, your Honor, we have. The question of whether or not they elected to comply has been stipulated to. Witness Lewis testified to it, that it never claimed that it had a union shop clause. It never tried to enforce that, and the court so held. If the union had tried to enforce that clause, it would have been extra legal to try to do that, because concededly they were not in compliance with that. We are not claiming that.

Mr. Robertson: That is the issue. We say regardless of what they contend, it is a union shop clause and it was enforced on our people.

Mr. Rayson: May it please the Court, let me say this. This is not a union shop clause. Certainly a question of interpretation of a contract is a question of law for the Court to decide.

The Court: Now you are a hundred per cent sound on that. The reason that the Court has permitted this in some instances, for your information, is not on the theory that the witness has a right to interpret that contract and it is binding in any respect on the Court and jury; the Court is permitting that to be done on both sides to a limited extent to test the knowledge of the witness.

Mr. Rayson: I understand.

The Court: The standard that he has used. That point is cleared up.

Mr. Rayson: But having said that a question of interpretation of contract is a question for the Court to decide, it seems to me that then we run into the fact that at least a half dozen courts have already said this, that this was not a union shop contract; it was not a union shop contract,

and that runs precisely afoul with their theory that by this contract union membership was imposed upon employees.

Now if employees became members of the union, they must have become members of the union by reason of something other than this contract, because, as the courts have interpreted this contract, it could not have required them to be union members. And that is our position, your Honor, and it seems to me —

The Court: Insofar as it relates to Tennessee, the Court holds that you are right, because you can't require an employee in Tennessee, as the law now stands, to become a union member, and Judge Miller at Nashville held that that contract was written there with the knowledge that union membership would not be required in states where the open shop or the right to work prevailed. Now isn't that 2689. the law?

Mr. Rayson: He also said, your Honor, that the same rule applied in all states where the Taft-Hartley Law or by operation of the Taft-Hartley Law —

The Court: I have enough trouble with Tennessee without looking to other states.

Mr. Rayson: Certainly what you say about Tennessee is accurate.

The Court: I don't remember that part distinctly, but I assume he said it because you said he did.

Mr. Rayson: Yes. Therefore, in light of those decisions of the court, your Honor, and in the language of the contract which has been interpreted to be in accordance with the Taft-Hartley Act by appellate courts in this circuit, of course we think that their repeated reference to this contract as a union shop clause is entirely improper. We object to it.

The Court: I sustain that objection as a principle of law. I think the principle of law is sound.

By sustaining that objection, I don't mean to cut you

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off, Mr. Robertson, in your cross examination to test the knowledge of the witness, memory and so forth.

2690 Off this union shop business, I hold that what Mr. Rayson said is substantially the law insofar as, certainly, it applies to Tennessee.

* * * * *

2691 By Mr. Robertson:

Q. On the protective wage clause in the 1958 amendment to the 1950 agreement, Mr. Owens, was a joint board of the signatory operators and the union set up to enforce this clause against any member operator violating it? A. As the contract provided for, in conformity with the contract.

Q. Do you recall who was on this board? A. Yes, sir.

Q. Mr. Owens, you testified this morning that the United Mine Workers, I believe, had never exerted any influence over the management of the National Bank of Washington. A. Yes, sir.

* * * * *

2694 Q. It is true, is it not, that sums of money were loaned by the United Mine Workers to Mr. Barnum Colton, president of the National Bank of Washington? A. Yes, sir.

Q. And that did total — those loans did total did they not something in excess of twelve million dollars? A. \$12,428,241.99, and he deposited as collateral to that loan 275,410 shares of stock, stock we have in a lock box with stock pars as security for the loan.

Q. And then another loan, I believe, in excess of nine million dollars, isn't that correct? A. Who to?

Q. To Mr. Colton? A. No, no.

Q. Well, that's all right. A. No, sir.

The Court: Now you wanted to ask him some questions after you stated the groundwork, which you have stated

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now, and I will permit you to ask that question now, Mr. Robertson.

By Mr. Robertson:

Q. I will ask you, Mr. Owens, whether or not a loan in the amount of several million dollars to the president of the National Bank of Washington isn't an influence 2695 over the management of that bank.

The Court: Ask him in his judgment, if he has an opinion about it.

Mr. Robertson: All right, Your Honor.

The Court: All right, I'll let him ask you.

Mr. Combs: If he's asking if in his judgment we have no objection.

The Witness: I'll be glad to give you my judgment.

The Court: Yes, sir.

The Witness: The executive officers of the United Mine Workers of America recognizes that they are incompetent to even suggest to a distinguished president like Barney Colton and his board of directors how to operate, what to do, and what not to do in operating a bank, because they have no experience in that line, so they rely upon the competent, known competency of the president of the bank, his board of directors, which constitute some of the most eminent men there is in the city of Washington.

It has nothing to do with labor unions, and of course we do not impose any opinion on them, because it wouldn't be worth anything as a banker.

By Mr. Robertson:

Q. Turning to another subject, Mr. Owens, do you 2696 recall in the United Mine Workers convention of 1956 a statement made by Mr. Lewis, and for purposes of apprising you of why the question is asked, you stated on direct examination quite extensively, I believe, that the United Mine Workers has never interfered with the management of any coal companies, is that correct? A. That's right, sir.

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Q. And I ask you if you recall Mr. Lewis' statement in the 1956 convention concerning an editorial which appeared in the Cincinnati "Inquirer" and he quoted from that editorial and added a comment on that editorial. The portion which he quotes —

Mr. Kramer: Will you give us the page so we can follow you?

Mr. Robertson: Yes, page 535.

By Mr. Robertson:

Q. "The operators, of course, no longer are squeezed in the price control. Nowadays they simply hand the consumers a higher bill for coal. The operators in general have been persuaded peacefully that it isn't worth the effort to dislocate coal production by resisting the UMW's demands."

And Mr. Lewis at that point states, "He left out a vital point there. It wouldn't do them a damn bit of good if they would."

2697 Do you recall Mr. Lewis making such a statement?

A. I remember the editorial; I remember Mr. Lewis commenting upon the editorial; but I don't think counsel should ask me to be specific, the language or the words that is in the proceedings of our convention, but to pick out in context some line or two in an expression of President Lewis, and imply that it means something that he had no intention of it meaning, is not pertinent to whether we violated the anti-trust law, certainly, and I don't think it has any bearing on it.

Q. Moving to another matter, Mr. Owens, did the United Mine Workers purchase a large block of stock, namely 222,720 shares of the Rocky Mountain Fuel Company in 1946? A. 1946?

Q. Yes. A. No, not in 1946, as such, but they acquired that, as I had stipulated in my interrogatories that they have that many shares of stock of Rocky Mountain

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2698 Fuel stock of a non-operating company, hadn't been operating for years.

Q. When were these shares of stock acquired, do you recall? A. You ask me if they were acquired prior to 1946?

Q. No, I asked if they were acquired in 1946. A. Well, I became secretary-treasurer on October the 1st, 1948, counsel, and I can't positively say they were acquired, different amounts on different dates, but we will be very glad if it would be of benefit to you to give you the day and date.

Q. Well, would you have — A. We have —

Q. You have answered interrogatories in this case about this subject. Would it be helpful if I read the interrogatories and the answer which you gave to that interrogatory?

A. I stand on the interrogatories that I have filed, it's a matter of Court record, that is it.

Q. All right. A. I testified to it.

Q. So your answer here which is as follows:

"Yes, 222,720 shares of Rocky Mountain Fuel Company stock, a non-operating and inactive company located in the State of Colorado, acquired in 1946, and the shares of stock in West Kentucky Coal Company as set out in this

2699 interrogatory 68."

That would be correct?

A. Yes, sir.

Q. All right. Do you know, Mr. Owens, whether or not Rocky Mountain Fuel Company was in operation at the time this stock was purchased? A. No, I don't think it was. I wouldn't be positive about that, but I don't think it was.

Q. This was the company in which Miss Josephine Roche was president? A. That's right.

Q. Was she president at that time, in 1946, or do you know? A. When we acquired the stock —

Q. Yes. A. — enumerated?

Q. Yes. A. I think perhaps in '39 or the early forty's, she did operate it, and I am not positive whether we acquired any of that stock until after the mine, after the property

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closed down. I can't testify to that fact, sir. In either case, we have got the stock, and it is in the lock box, and it is ours.

Q. Do you know whether or not that was a new issue of stock or whether it was purchased stock? A. Oh, no, 2700 it was purchased, thousands of shares of that stock,

Rocky Mountain Fuel Coal Company was a large corporation that was in operation over a period of years. There is a lot of that stock held in estates and in foreign countries, and it is sometimes available in fifty lot shares, ten or fifteen cents a share, thirty cents a share, and that is how it's been acquired over a period of years.

We think that perhaps someday — there is a lot of acreage there, a lot of surface, there is a trend of perhaps discovering oil, and those — and shale and coal that is in those — may be very valuable in years to come. We don't know, but we got the stock. We made the investment, and we so stipulated to the Court.

Q. Now moving on to another subject, Mr. Owens, as to the certificate of deposit which the United Mine Workers pledged as security for the one million five hundred thousand dollar loan by the National Bank of Washington to North Fork Coal Company, I believe you stated on direct examination this morning that that was to aid an area where unemployment was quite prevalent, is that correct? A. That was the purpose as far as we are concerned, counsel.

Q. I would like to know, Mr. Owens, how that would aid unemployment? A. Well, if they acquire acreage 2701 down there, and operate mines, put a lot of men to work, help the economy in that community, that is in distress, just the same as the city of Knoxville buying a piece of land out along the road and trying to get a manufacturer to build a plant down here which they have done.

It is a matter of civic pride, it is a matter of investment of our money in something we think that would be tangible benefit to the community, businessmen, state, country, and to the coal miners that we represent, a matter of judgment,

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a matter of whether you want to do something or whether you don't want to do something. We try to do something.

Q. It is true, is it not that this money was merely used to acquire coal lands, coal leases? A. With the expectation of— I don't know what the purpose of acquiring — you couldn't operate a coal mine if you didn't acquire the property that you were going to do it with, on.

Q. North Fork Coal Company isn't an operating company? A. Well, they raised a million and five hundred thousand dollars for the purpose of enhancing production and employing men down there, so they led us to believe.

Q. Did they represent that they were going to operate that property in there? A. What property?

2702 Q. The property that they were going to acquire with this money? A. Well, they made a request to the bank for credit, and we gave them credit for it, and we haven't discussed — I don't want to discuss with them — as you say we don't want to interfere with the operating mine, their investment. We have no control over it. We don't want to have any control over it.

Q. Did you know at the time that this one million five hundred thousand dollars worth of union assets was pledged that this was a non-operating company, was merely going to use it to buy up reserves of coal land? A. No, sir, not for that purpose. I assume that they were going to use it in order to produce coal.

Q. Did you know whether or not it was going to be used for that purpose, did you — were any of the transactions — were you personally in on those transactions? A. Not with any transactions of that kind, sir.

* * * * *

2703 Q. Mr. Owens, in the 1960 convention of the United Mine Workers of America, I believe held in October, 1960, you made a report to the convention as to the finances of the union, and on page 15 of the transcript of your report

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which you furnished to us in answer to interrogatories, you stated — A. What page, sir?

Q. Page 15.

Q. This sentence, which is following statements by 2704 you concerning certain financial transactions and investments on the part of the union, and you make the following statement:

“So in doing these things, my friends, we brought about stability in the Pittsburgh-Midway properties.”

My question is, what did you mean by that statement, Mr. Owens? A. Sir, that was either a typographical error or — I did not have any intention to even mention the Pittsburgh-Midway. It was either a typographical error or slip of the tongue, that it did not have nothing to do with the Pittsburgh-Midway.

Q. And one final subject that I would like to take up, and that is the signing of the contracts following the 1950 contract, from the 1951 amendment on.

I refer here to page 150 of the 1952 United Mine Workers convention minutes, where it is stated, under the subject matter “Washington Conference of 1951”:

“One of the outstanding accomplishments of our distinguished President John L. Lewis, was his successful negotiation of the 1951-52 agreement without publicity or fanfare which became effective February 1, 1951, five months before the expiration of the then existing agreement.

2705 “Mr. Lewis had many conferences with Mr. Harry M. Moses, who represented the industry. Finally, in Mr. Lewis’ handwriting, the suggestions below were given to Mr. Moses, who made a copy of them and handed the copy to Mr. Lewis, retaining those in Mr. Lewis’ handwriting” — and then this paragraph goes on and states what those pertinent provisions were:

Mr. Owens, was this the method used in negotiating the various amendments through the years to the 1950 con-

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tract? That is, these conferences between Mr. Lewis and Mr. Moses and then after Mr. Moses death with Mr. Fox? A. Well, the succeeding contracts after, as I related the experience of these public hearings in washing the questions before us out in the public press, the coal operators elected Harry Moses, who was recognized in the industry as perhaps one of the outstanding coal operators, spent his lifetime with the United States Steel, Frick, his father was a coal miner, and the coal operators themselves elected Harry Moses to represent them, and the United Mine Workers had President Lewis as head of their union:

And they thought it advisable to convene conferences between the parties selected by both groups to see if there could not be a meeting of minds on the terms and conditions of a successive contract, succeeding contract, and they met from time to time. And they met or conferred with 2706 their associates on both sides.

We would assemble a policy committee and they assembled their negotiating committee from the operators, and we discussed terms that they had been discussing in the joint conference and perhaps had a meeting of minds, and they would recommend the consummating agreement perhaps after additional men had been called in on Moses' side and participated in by Kennedy and I with Lewis.

That has been admitted as the most successful way, and has been operating successfully up until the present time.

That comes about, counsel, because of the fact that there is no other vehicle, that we know of, after 50 years, that can bring about in an orderly manner, without fanfare, the desires of the coal operators as to terms they are willing to pay and a desire upon our side after consultation, orderly, that we can recommend to our policy committee, and none of the conferences that precedes consummating of the agreement has the authority to make the agreement in toto until they are authorized by their negotiating committees, but ours is the International Policy and the operators have what they call their scale committee.

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That is how it has been done, sir.

Q. Well, was this policy committee, did it sit in on 2707 these informal conferences between Mr. Lewis and

Mr. Moses or was it submitted to the policy committee after the draft had been made by those two gentlemen?

A. The granting authority to it come from the policy committee first.

Q. Yes. A. And then you can't — a policy committee consists of maybe 85 to a hundred men, so it goes that you can't negotiate a contract on both sides with 85 men on each side representing different views. You would never arrive at a conclusion as far as any stipulation of a certain contract.

So they stepped down and our policy committee gives a grant of authority to negotiate the contract, or to negotiate recommendations of a contract and to confer with like numbers named by the operators.

See counsel, collective bargaining is not a one-way street. Collective bargaining is between both groups, and we have to abide and adjust ourselves to the combinations of the industry. If they only select two men, or three men, to represent them, we have no authority under the law or anything else to tell them to bring in 50. And if they say that they are granting authority to Harry Moses or Mr. Fox, and officially advise us and they stipulate that they represent a tonnage, we are bound to meet them — bound to 2708 discuss the contract with them because that is the coal operators' right.

We have to adjust ourselves to the combinations of the coal operators and nothing in the contract is in there unless both sides agree to it. That is how it is done, sir.

Q. I take it then, that the policy committee would designate Mr. Lewis to sit in these informal conferences and then the draft would go back to the policy committee after these meetings between these two gentlemen; is that cor-

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rect? A. Them and two or three or four others on each side.

2709

S. L. JEWELL

called as a witness by and on behalf of the cross-defendant.

DIRECT EXAMINATION

By Mr. Rayson:

Q. Would you state your name, please? A. S. L. Jewell. J-e-w-e-l-l.

Q. Where do you live, Mr. Jewell? A. St. Louis, Missouri.

Q. I believe you are with Peabody Coal Company; 2710 is that correct? A. That is correct.

Q. And what position do you hold with Peabody Coal Company? A. I am one of the vice-presidents of the company.

Q. What is your area of responsibility? A. Primarily in sales and company business related to sales.

Q. And how long have you been with Peabody Coal Company? A. With Peabody Coal Company itself only since 1955. With one of the companies that went into the merger that formed Peabody Coal Company since 1919.

2711 Q. Now, Mr. Jewell, since you have been with Peabody proper since 1955, what position have you held? A. The same as I just described.

Q. Now you say you have been with Peabody or one of the companies which now makes up Peabody since 1919. Was your first experience in the coal industry in 1919? A. That is correct.

Q. What company were you with at that time? A. The Southern Coal Company, Inc.

Q. Where was that located? A. Headquarters was in Memphis, Tennessee. The office that I was in most of the years was in Chicago. It had branches in different cities.

Q. Was the Southern Coal Company an operating com-

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pany or a sales company? A. No, sir, it was a sales agency company.

Q. And I take it your work was in sales with Southern Coal Company? A. Yes, sir, it was.

Q. What employment did you have in the coal industry after your employment with Southern Coal Company? A. Well, Southern Coal Company, as I stated, became a part of the Peabody Coal Company.

Q. Did it become a part of some other company
2712 prior to becoming a part of Peabody? A. I recall during the transition period for a temporary time the name Peabody-Southern was used. It was the same organization. Just a change of name.

Q. In any event, you went from Southern Coal Company and Southern-Peabody into Peabody in 1955? A. Through —if I may explain that.

Q. Yes. A. Through the merger process, the Sinclair Coal Company acquired control of the Southern Coal Company.

Q. I see. A. And continued to operate it under that name, but under the ownership of Sinclair. Sinclair in 1955
2713 was merged into Peabody Coal Company, took Southern in with it, temporarily operated the sales division under the name Peabody-Southern Coal Company. Then subsequently in a relatively short time dropped that name and it operated simply as the sales department of the then Peabody Coal Company.

Q. Now, Mr. Jewell, where are Peabody Coal Company mines located? A. The company has mines in Oklahoma, Missouri, Illinois, Indiana, western Kentucky, and Ohio.

Q. Are your mines strip mines or do you have an underground mine also? A. We have one underground mine. The remainder of them are strip mines.

Q. Where is your underground mine located? A. Near Springfield, Illinois.

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Q. Mr. Jewell, in your experience in coal sales, have you had occasion to sell coal to the TVA? A. Yes, sir.

Q. How long have you been selling coal to the TVA? A. Oh, for 12 years or more.

Q. Have you dealt with TVA on term contracts for coal and also on spot contracts for coal? A. I have dealt with them on term contracts considerably, very little on spot because our company has not been active in the spot market of TVA to any appreciable extent. In fact, we have
2714 not had a spot order to my knowledge in more than three and a half years.

Q. Mr. Jewell, I have handed you Exhibit 101, which has been previously introduced in this case, which purports to show certain activity of Peabody Coal Company and the TVA spot contract market in the fall of 1956 and for a period in 1957. Now, first of all — A. Are those dates shown on this chart? I don't see them. Oh, yes, I do. Yes, I see them.

Q. Before we get into the figures shown on this chart, I would like to ask you this question, Mr. Jewell. What would occasion Peabody Coal Company to submit a bid on the TVA spot market? A. Desire to sell coal. Hope of selling coal.

Q. What sort of a market does the TVA spot market furnish for Peabody? A. It has not furnished a lucrative one. One we have not been able to compete in. We have bid pretty consistently, I believe. I will have to qualify — I am practically certain of it. We bid practically every month and we haven't had a successful bid in three years, I believe.

The chart may show differently, but that is the best,
2715 of my recollection.

Q. During the period of 1956 and 1957, did you have certain successful contracts in the TVA spot market? A. I wouldn't call a spot order a contract.

Q. Well, a spot order. A. We had evidently certain small

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spot orders as shown here. I said we had had a few, but relatively few; negligible by comparison with our size and our tonnage and the purchases of TVA.

Q. How would you go about arriving at the price at which you bid for one of these spot orders? A. Well, by just the same processes of judgment and assessing the market as you would anybody else. You view as best you can what the recent market history has been in that selling area, compare that with what you know of the market generally, from your reports, from your sales force and your own contacts with the market, and determine what the lowest price you think you would need to quote to have an opportunity to get favorable consideration and then determine what price you are willing to sell your coal at, and wherever you can square that off, determine the price.

Q. Did you keep up with the bids that have been submitted to the TVA spot market? A. I pretty well lost interest in them two or three years ago because we were so uniformly unsuccessful on it.

Q. Did you prior to that time? A. Oh, yes, and I do now. They come into me occasionally and say, "We would like some little bid. What price?"

And we go over it together, and I say, "Quote this and that price won't get an order probably."

And they say, "No, it might."

If we need some more tonnage, "Can we go a little further?"

And I confer with my associates. "Can I go lower than that?"

And they say, "No, that is the lowest, whether we get the order or not."

And I don't pay any attention. And a few days later they will tell me that we were competitive or we weren't. And for a long time now the report has been that we were not.

Q. Mr. Jewell, what part of the TVA system would you make your bids to, to the western division plants or to the eastern division? A. We don't specify that. I believe I am correct in saying TVA reserves the right normally and habitually of taking any tonnage it may purchase from you and sending it to any plant that it finds advisable and desirable. The plants we would have in mind being able to reach primarily from the western Kentucky field, 2717 which is where we bid from primarily, would be the Shawnee plant, the Johnsonville, Tennessee plant and the Colbert, Alabama plant.

Q. Do you know if you have ever sold coal to Kingston or John Sevier? A. I am positive we have never sold any to John Sevier. Whether the TVA ever took any of our coal as far as Kingston, I have no way of being sure. They wouldn't normally do so and have not done so. It never came to my attention if they did.

Q. Would your mines, would you consider your mines to be competitive in the Kingston and John Sevier area? A. Positively not.

Q. Why would they not? A. The distance from the market, unfavorable relative freight rates.

Mr. Rayson: Your Honor, we have placed on the bulletin board, with the consent of opposing counsel, an enlargement of the TVA map previously introduced, and, of course, I may point out that the plant that the witness has mentioned, we have here in upper east Tennessee the John Sevier plant (indicating), here is Kingston, and the three plants the witness mentioned are Colbert, Johnsonville and Shawnee (indicating).

2718 By Mr. Rayson:

Q. Now in dealing on the TVA spot market, Mr. Jewell, to the limited extent that your company did, I would ask you if in any manner the United Mine Workers of America conferred with you or suggested to you in any

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way the price at which you ought to offer your coal? A. Never at any time in any way.

Q. Did any other coal companies make any suggestions to you in that regard? A. No, sir.

Q. In offering your coal and in selling your coal to the TVA on that market, did you have any intention of depressing the price of that market? A. Absolutely not. We hoped to see it get up to where we could participate.

Q. And in selling and offering your coal on that market, did you have any intention of running out of business any operators in east Tennessee? A. No, sir, we have been busy staying run out ourselves so far out of that market.

Q. Now I want to ask you about the activity of Peabody Coal Company with reference to term contracts with the TVA. What has been your first experience with a term contract with the TVA, Mr. Jewell? A. I am not sure I can recall offhand my first experience. We consider anything a term contract — well, about — I guess the shortest 2719 ones we have had have been, at any time, three years.

We may have had as early as 1949, '50 some two year or three term contracts of relatively small size. The first term contract of consequence that comes to my mind is one made in the year 1952, which was a ten year contract and which will expire next year.

Q. What was the tonnage involved on that contract? A. The base tonnage set forth was 500,000 tons annually, with the TVA reserving the right on its own option to increase the tonnage by the amount of 20 per cent or decrease it by an amount of 20 per cent.

You say what was the tonnage. The tonnage has developed to be 20 per cent less. They very shortly after the contract went into effect made the 20 per cent reduction, so we have been shipping at the rate of 400,000 tons annually on that contract.

Q. You are now and will continue to do so until 1962? A. We trust so. We are now.

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Q. Have you negotiated other term contracts of consequence with the TVA? A. Yes, we have had a number of them during the interval from 1952 — we have had — I couldn't tell how many — a number of three year contracts. Principally our short term contracts have been three year contracts. Say a number of them, maybe a half-
2720 dozen of them. I would have to refer to the records to know. Most of them are relatively small contracts, maybe for 25 or 50 thousand tons a year.

I am not testifying accurately on that. It is just from memory. We haven't had any of great consequence of very substantial tonnage until the contract which was negotiated in 1959 and which has not yet become effective and will not become effective until 1962, and that is a much larger contract.

Q. You mean 1962? A. 1962. Excuse me.

Q. You have reference to the contract for the Paradise steam plant? A. Yes, sir.

Q. Is that the steam plant in Kentucky shown on this chart on the blackboard? A. It would be Muhlenburg County, Kentucky on the Green River, directly east of Drakesboro, Kentucky, near the small village of Paradise, Kentucky. Yes, sir, that is it.

2721 Q. Now, is that plant in operation at this time? A. No, sir.

Q. Do you know when it is expected that it will go into operation? A. It is expected to go in operation in the fall of 1962.

Q. What is the quantity of coal called for by that contract? A. The contract specifies that the rate of shipment, as I call it, will be for the first six months of operation at a rate of two million tons annually; thereafter at a rate of four million tons annually, until a total of — I am confident it is sixty-five or sixty-six million tons has been shipped.

Q. And over what period of time? A. Well, that mathe-

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matically would require, I believe, seventeen years, the way I recall it.

Q. Now, does Peabody Coal Company have property near the site of the Paradise Steam Plant? A. Oh, yes, that is why we made — were able to make the contract.

Q. Where is that property located? A. The property is west of the plant. Some of the property is slightly southwest, but principally to the west immediately adjoining the plant site.

Q. Is that — you mean it immediately adjoins the 2722 property on which the Paradise Steam Plant is located? A. That is right.

Q. Now, with reference to the Paradise contract, and the other contracts that you entered into with the TVA, how did you come to submit a bid on behalf of Peabody? A. In an effort to sell coal, that's our business to sell coal. They are the coal user that announced their position to buy coal, and our business is selling coal. We were looking for business. We acquired acreages and property for the purposes of developing mines on them and selling the product, so it is a logical development for it.

Q. Does the TVA submit an invitation to you to enter a bid? A. Oh, yes. Not to us. They submit it publicly. They publish the fact that invitations are to be submitted, and all who want one can ask for it, and we always ask, and we are on the list to receive it now after having asked, along with coal companies generally.

And does the TVA in those invitations specify in general the quality or quantities of coal? A. It leaves great leeway in that. It usually tells the amount they intend to purchase, sometimes exactly, sometimes approximately, but the bidder has leeway in how much he wishes to offer.

Q. Now again with reference to the Paradise Mine, 2723 or Paradise Steam Plant, does your property near this Paradise Steam plant contain any particular

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amount of coal? How much coal does it contain? A. It contains, we estimate, sixty-six million tons.

Q. And is that why you were interested in selling coal to the TVA in that quantity? A. Yes, sir, we wanted to sell the coal from this property, that is why we had acquired the property ten or twelve years ago. We thought it was an advantageous site, good coal mining conditions, so we were willing, and willing to sell the entire amount of it. That is the way we like to sell it.

Q. Had you attempted to sell it before? A. Many times to groups of utilities and individual utilities.

Q. Had you done any developing of that property with respect to mining it prior to — A. No, sir. No.

Q. Now, with regard to the term contracts that you have entered into with the TVA, how you determined the price at which you would offer your coal? A. Just a matter of judgment. The way we determine the price ordinarily is how — we know it is a highly competitive market, the entire coal market is highly competitive, and we simply
2724 determine what is the lowest price at which we feel we profitably can operate this property and produce the coal and sell it.

Q. Now, in selling the coal to the TVA with reference to these various term contracts that you have had, obtained, have you ever entered a bid or secured a contract at a price which was suggested to you in any manner by the United Mine Workers? A. Oh, no, sir. No.

Q. Has this ever been a matter in which your company has conferred with the United Mine Workers? A. Oh, no. No.

Q. And have you gone into this question of price before submitting bids with other companies? A. No, sir.

Q. And have you submitted bids to the TVA on these term contracts with the intention of depressing the price of the TVA market? A. Repeat that Question. I want to be sure I understand you. That confuses me. Why in the world, if I understood you, would anybody in the market

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they are hoping to operate in and do operate in want to depress the market. Did I under the question?

Q. Yes, sir, I asked you — A. Why, of course not. Preposterous.

2725 Q. And have you submitted any of these bids, Mr. Jewell, with the intention of driving out of business operators in East Tennessee? A. No, sir, no, sir, of course not. That is just as preposterous as the other thought. It couldn't have any bearing on any operator in East Tennessee as far as we would be conscious of. If so, it would be remote. It couldn't be a purpose.

Q. Now, Mr. Jewell, I'll ask you if you have had occasion in the 1950's, recent parts of the 1950's to sell coal to Tampa Electric Company on behalf of Peabody Coal Company? A. Yes, sir.

Q. Did you ultimately enter into a contract with Tampa Electric Company? A. Yes, sir, we did.

Q. When was it that that contract was entered into? A. Well, I will have to refresh my memory on that. It was done by steps and stages.

I think we reached an agreement on it in the latter part of '58, and I think we reduced it to written contract — yes, we did — in the early part of '59, February, I'd say, of '59.

Q. Now, what had been your efforts with the Tampa Electric Company to sell coal to that company doing
2726 business in — A. They have not been very active.

Frankly, we went to sleep on the job there a little bit, and another coal company stepped in there and scooped us, and stepped in and got a contract. We knew them, and we called on them but we hadn't realized Florida was too good a prospect. We went down occasionally and called on the utilities. We knew Tampa Electric, but we had not gotten them into any serious negotiations with us, and another company did, the Potter Towing Company secured a contract.

Q. Excuse me, was that the company that was then owned by Nashville Coal Company? A. It was.

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Q. It was the Nashville Coal Company, then, owned by Judson Potter? A. Justin Potter.

Q. And what was the name of the transportation company that entered into the contract? A. As I recall, Potter Towing Company.

Q. What did you do after you found that that contract had been entered into? A. We congratulated Mr. Potter and continued to call on Mr. MacInnes and tell him the next time he wanted to buy coal, we hoped we would be more ready than we were this time to seriously negotiate with him.

We did not at that early stage have water-carrying facilities, and the Potter Towing Company did, and they beat us to the draw, but we kept in touch, because these utilities grow and build additional units and plants.

Outside of that, I can't say we did anything except keep in contact and hope for opportunity to do business at a later date.

Q. You spoke of Mr. MacInnes. Who is — A. He is president of the Tampa Electric Company. Excuse me, I thought that had been brought out.

Q. Did you later have further discussions and negotiations with the Tampa Electric Company, and if so, how did they come about and when? A. Well, you said did I later. That last question you asked me in the early fifty's or mid fifty's.

Q. That's right. A. I told you what we had done back for a period of time.

I am not sure of all of these dates. I think 1957, we heard and it was generally heard by the gossip route and maybe in the papers that the company that had taken over the original Potter Towing Company contract with Tampa Electric had given notice to Tampa that it was not going to perform on the contract.

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Q. Was that West Kentucky Coal Company? A. It was West Kentucky, which we understood had purchased Nashville Coal Company, and it subsidiary the Potter Towing Company.

Of course, that re-aroused our interest, and we got active again in our contacts with Tampa Electric Company. We went to see Mr. MacInnes, and tried again to sell him coal, and continued to try.

Q. And when you say you went to Tampa Electric and undertook to negotiate with Mr. MacInnes — A. I will have to qualify, I think it was in the early fall of 1957. I am almost positive that is when that was.

Q. Now what resulted after your — after these discussions that you had with Mr. MacInnes at that time? A. Well, after many contacts, many discussions, it resulted in what we called a sort of a test order for something like — we shipped a total of one hundred forty thousand tons, I believe on it, which we secured from the Tampa Electric Company.

We were not ready to negotiate seriously on a contract, and Tampa Electric wasn't either, but we wanted them to test our coal, and they were willing to test it, and we wanted to test out our experience of river shipments and transferring the shipments and shipping them across the Gulf before we committed ourselves to a substantial, long-term contract.

Q. And when — A. So that order was secured for that purpose, and granted for that purpose.

Q. Mr. Jewell, did you go to the Tampa Electric Company and negotiate with those people at the suggestion of the United Mine Workers? A. No, sir.

Q. Did you go there to negotiate with Tampa Electric Company at the suggestion of anyone with West Kentucky Coal Company? A. No, sir, not with the suggestion of them and not with the knowledge of any one of them so far as we have any way of knowing.

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Q. Now, when was this one hundred and forty thousand tons shipped to Tampa? A. That was — took us about a year to get that order, so it must have been — started in late '58 and extended over into '59, probably into the spring of '59.

It was a makeshift arrangement we had, and we 2730 had to move pretty slowly. We weren't really equipped to handle it. We wanted to get some coal in their hands.

Q. And how did you get it to Tampa? A. We had at that time established a barge company which is a subsidiary of Peabody Coal Company named the Mid-American Transportation Company, which is a barge line company. We shipped it down the river on — by that method.

We transferred the coal from barges to Gulf Transit equipment at the Burnside transfer facility owned and operated by Olin Mathieson Corporation at Burnside, Louisiana.

It was shipped from that point in open vessels without loading or unloading facilities to Tampa by an arrangement we made with the Marine Transit Company of Tampa, Florida, who were engaged in transporting products across the Gulf, in one way or the other, and it was unloaded at the Tampa Dock with a crane and clamshell that we sent down from Western Kentucky, down this hundred some odd thousand tons of coal, because we were unable to get arrangements for the use of an unloading facility that was on the dock, which was owned, incidentally, by West Kentucky Coal Company.

We had attempted to get the use of it through some lease arrangement, and we were unable to secure that equipment from them.

2731 Q. Did you also — A. We had the order, we took the gamble. We thought we could surely get that equipment. They are a rather friendly company, and when we got it, we couldn't get the equipment, and we did some-

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thing that was very unprofitable. We had to ship a crane down there, and unload it to ship our coal.

2732 Q. In other words, West Kentucky would not deal with you with reference to this equipment? A. They wouldn't make a deal that we could go for. I don't recall the negotiations, wholly unsuccessful. They may have at sometime said they would agree to so and so, but nothing we could ever consider at all.

Q. Did you ship any of the West Kentucky Coal Company coal on this contract to Tampa Electric Company? A. No, never have. Did not and never have.

Q. Now during the period that you were shipping the tonnage on this test order to Tampa Electric Company, you were also negotiating with Tampa Electric Company for a term contract? A. Oh, yes. That was the purpose of shipping a test order, to try to get it going and after we got some we got into more serious negotiations on that and continued them until we begin to get results on a contract, and finally did get results.

Q. When did you reach an understanding with Tampa Electric as to the term contract? A. Well, I would say late in 195-- well, early in 1959.

Q. Now what was -- A. We made a contract, signed, as I remember, in February of 1959.

2733 Q. What does that contract call for? A. It called for a schedule of tonnage. Very small the first year. Maybe 150,000 tons, I don't recall, maybe 200,000. And then the next year when another unit would be complete it steps up considerably, to, I believe, 600,000 tons. And we get in the third year the tonnage was supposed to be 800,000 tons, but it seems that they got a little accumulation of coal and we might not get to ship that much. But that is the range and it increases. I can't remember the exact steps. It goes up, after the 5th, 6th, or 7th year somewhere around a million and two hundred thousand tons and extends for a period of 20 years.

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Q. Do you know whether this quantity of tonnage is all of the coal which Tampa Electric will use during that period of time? A. No, it isn't all of the tonnage. They are using other coal now that they receive by rail. I guess they still are. They were the last time I was there.

Q. Have they been using other coal during all this period that you have been selling coal? A. Yes, they have.

Q. You say that is rail coal? A. Yes,

Q. Do you know where it comes from? A. Why hearsay only. I have been told it comes from East Kentucky 2734 and East Tennessee.

Q. How are you shipping this coal on this term contract to Tampa? A. We are shipping this coal with water shipping facilities that are owned jointly by our own company, Peabody Coal Company, and Tampa Electric Company, which arrangements were worked out in the time — during the time immediately following the execution of the contract.

The contract was executed by a long time before we could ship because we had to get the water facilities. The contract was executed in February, 1959, but we did not get started shipping on it until December of 1959 because jointly the Tampa Electric Company and the Peabody had the necessity of setting up water shipping facilities. One a bare line, which is called the Mid-South Towing Company, and a Gulf steamer, which is a converted T-2 tanker called the "Martha Mack" which is a 15,000-ton ship.

Q. Are both of these companies, that is the barge company and the Gulf shipping company, jointly owned by Peabody and Tampa Electric Company? A. That is right. There is a transfer involved. You want the detailed facts?

Q. Where do you barge the coal to, what point? A. We barge it to, recently, last few months, to a point just south of New Orleans. Previously, for the first four or five 2735 months, maybe six, we transferred up-stream above New Orleans.

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We were unable, for a long time, to make arrangements for facilities. Tried to but didn't. But we had to equip the ship with clamshell with which it can reach over into the barge and take the coal out of the barge and dump it into its own hold, and at the destination then it reached in the hold and take the coal out and unload it. That was the original method.

We later acquired or leased, made a lease arrangement with West Kentucky Coal Company for a transfer facility that company owns at Mrytle Grove, Louisiana. About 45 miles south of New Orleans. We now make the transfer from barge there at that point using that facility.

Q. Had you negotiated the use of the facilities of West Kentucky Coal Company prior to the time you had reached an understanding with Tampa Electric? A. Oh, no, for, as I say, we had to transfer for months in mid-stream with our own equipment because we did not or had not reached an agreement on it.

Q. Now I will ask you, Mr. Jewell, if after you reached an understanding with Tampa Electric Company on this term contract, whether you worked out an agreement with West Kentucky Coal Company to buy from West Kentucky Coal Company an amount of coal equal to half of the coal you were selling to Tampa? A. Yes, we did.

2736 Q. Has any West Kentucky Coal Company coal been shipped on your term contract to Tampa Electric? A. No, sir.

Q. And what have you been doing with the coal you have been buying from West Kentucky Coal? A. I know what we are doing with it now. I think it has been done with it right along, is we are shipping it on another contract which we have, which is a contract with the City of Memphis — Light, Gas and Water Division of the City of Memphis, Tennessee, to a municipal plant operated by that division.

Q. The West Kentucky Coal Company coal is being shipped to Memphis? A. That is right.

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Q. Why did your company enter into this contract with the West Kentucky Coal Company? A. Well, there are many reasons for buying of coal. We produce and sell our own coal. We also, at times, for various reasons, buy some additional coal.

In this case this is a waterborne contract or shipping coal by water. In other words, the coal in this contract we have the privilege of shipping not just from our own mines but we specifically have the privilege of shipping coal from any mine we desire so long as it meets the quality specifications of the contract.

We did that purposely because we only have two river mines in western Kentucky. The River Queen mine and the Ken Mine. And we wanted a little broader base than that to be sure to be able to give service at all times.

You can have a breakdown in a coal mine or a coal dock. Now it is very logical in a contract of this responsibility and this size to have as many sources available as possible. That is one good reason for doing it.

We had a number of other, two or three, contracts near Cincinnati, New Albany, Indiana — many of them. When you have those contracts you are responsible. You want to be sure you can perform.

It wasn't out of any unusual force. It was good to have another source of supply.

I can tell you other reasons.

We at that time were hoping to get, and trying to get, the good wishes and cooperation and help of West Kentucky Coal Company on a problem which was a little delicate. We knew they had the contract and they had some reason for not shipping on it and we had moved in on it.

We were trying to get their blessings and cooperation to the extent we could make a deal with them for the use of that Myrtle Grove dock. They needed business badly, just as perhaps we all do, but we knew that they needed business. We were in position to place this amount of tonnage with them, and it was in the interest of

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good relations between the companies for us to do it, and we discussed it and believing it was helpful and I finally reached an agreement with them on the Myrtle Grove dock.

I can think of those reasons offhand, and I think they are sufficient to justify it if any justification is needed when you are in the coal business buying coal.

Q. When was it that you worked out this agreement with West Kentucky? A. I tell you I don't know. It was sometime after the contract was made. Just how long I just don't recall.

Q. It would have been sometime after February of 1959? A. Oh Lord it was after, yes. I am confident it was; yes. I started to say a good deal after it, but I am not sure at all, but I am just as sure it was after. We couldn't have started before because we didn't know we had the contract.

2739 Q. Now, Mr. Jewell, what was your purpose in selling and negotiating this contract with Tampa Electric Company? What were you trying to accomplish?

A. Promote our business, a normal way to sell coal, broaden our market, sell more tonnage, do more business.

Q. Were you trying to monopolize the coal business in Tampa or were you attempting to depress the price of coal in Tampa in any way? A. No, sir.

Q. Were you doing this at the suggestion of any other company or the United Mine Workers of America? A. No, sir.

Q. Were you attempting to—was it your intention in entering into this contract in negotiating for it to run mines in east Tennessee out of business? A. No, sir.

Q. Mr. Jewell, in selling your coal, and I take it that most of your coal is mined by the strip mining method as you have testified, do you sell your strip mined coal to various markets, and if so, what would they be? A. You mean geographical markets or use markets?

Q. Use markets. A. Oh, yes, we have domestic coal, heat-

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ing coal, which is lump, egg, stoker coal, for heating, and then the usual screened steam coal.

2740 Q. What are the differences in these markets price-wise in general terms? A. Well, they are considerable. You get down to your lowest most difficult grades of steam coal to sell, which we call carbon, which is one-quarter inch by 28 mesh, carry very low price now. Something like \$2.80 a ton. You get up to your egg coal; domestic use, you are in the range of \$5.25 or \$5.50 a ton. It varies. Your stoker coal, for domestic use, would sell for \$4.85 a ton. Your normal screenings, inch and a half by 20 mesh screening, would probably be selling in the range of \$3.25 to \$3.50, \$3.75, depending on quality of the coal.

Q. In other words, there is a considerable difference in the price that strip mined coal would bring—is that an accurate statement? A. You mean different sizes of strip mined coal?

Q. Yes. A. Strip mined coal or any other kind of coal. Choice of domestic sizes bring more money than steam size.

Q. What sort of markets do you have? Where do you sell your coal? Percentage-wise, what amount of your coal goes to the steam market as opposed to these other markets? A. Ours, a large per cent goes to the steam market—70-odd, probably 80 per cent of our coal goes to the steam market.

2741 Q. Now is the steam market the lowest price coal? A. Yes, sir. It is also the biggest market. That is the reason we have to go that heavy in it. You couldn't market the quantity of coal we produce in the domestic market.

Q. Mr. Jewell, did you attend the meeting of TVA directors, 1958, at which a representative of the United Mine Workers was present? A. I attended a meeting of a group of coal people and board of directors of TVA and some of the staff of TVA from Chattanooga, at which a United Mine Workers representative was present.

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Q. Was that in Knoxville or Chattanooga? A. It was in Knoxville, right here.

Q. Who had arranged for this meeting? A. My best memory is that Mr. Bayfield of the American Coal Sales Association in Washington, D. C. arranged for it.

Q. Is he the person who asked you to attend? A. Yes, sir.

Q. What was the purpose of the meeting? A. The purpose of the meeting was for an exchange of views between coal producers and sellers and the TVA regarding their coal buying policies, their coal procurement program, 2742 their cooperation with the coal industry and the coal industry's cooperation with it. That was the general approach.

Frankly, we had in mind and stated very frankly then, we had some very pointed suggestions we wanted to make and requests we wanted to make for changes in some of their policies.

Q. Did you discuss with them any particular policies that you objected to? A. Yes, we did. We discussed the length of time they were waiting to announce awards after bids were made, left you not knowing whether you were obligated or not. It seemed to us it would take 60 or 90 days, which they were doing at that time, to let people know if they were successful or unsuccessful, which was unnecessary and unreasonable and worked a hardship on us. That was one of the things.

There had been one instance where they actually, while they had one set of bids pending and no action taken on them, put out another inquiry, which we thought was immi-
nently unfair, and which they admitted was improper, unwise and unintentional and was a slip and promised that they wouldn't do it again. It was all after much discussion.

We discussed with them their attitude toward coal prices. We charged that they were using the full weight of their

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influence and their persuasive influence to drive people down in prices. People call on them. "Get your pencil sharpened," they say. Won't get any business here unless they get down low. The bids are going to be competitive. We thought they were carrying that too far. They should take a constructive viewpoint and lend their influence toward influencing people to quote prices that would net a reasonable profit to the mine and still give TVA reasonable cost price for coal.

Just an exchange of views. Air out some differences that had existed. We thought it was better to talk to them than talk about them. Told them just that: Had a very friendly discussion with them.

Q. Were you making any demands of the TVA? A. Oh, no, we couldn't make any demands. We made suggestions and requested consideration of certain suggestions.

Q. Was the matter of the amount of coal that TVA purchased by way of term contract discussed? A. That was discussed. Not too forcefully. We suggested that they give consideration to buying a larger percentage of their coal on term contract and a smaller percentage on spot. We didn't get very much response from them on it. It was discussed.

Q. What was the position—who was there for the United Mine Workers, do you remember? A. Mr. Widman. I believe it is Michael Widman.

2744 Q. What was his position at this meeting? A. As I recall—I don't know whether he heard about the meeting and asked to come or whether Mr. Bayfield or Mr. Joe Moody of Washington asked him to come. It was a rather informal proposition. He was interested because he was interested in anything that bears upon coal, just as he is on freight rates or anything else for better understanding, at least better movement of coal.

Q. Did he have anything to say? A. Yes.

Q. Do you recall what he said? A. I recall he made a

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nice little speech and said about what I said there. He was there for that purpose. He was interested, and he would like to see better coal prices prevail. If there was any way they could cooperate—of course, through that background. They said, "We don't set the prices. These boys here set the price. Submit the bids and we buy or don't buy." A general discussion of that sort. Mr. Widman more or less set in and did make a nice statement he was interested.

Q. Did he say why he was interested? A. Because his union had a great many members that were mine workers, they were interested in their welfare and interested in a healthy coal industry, therefore.

Q. Mr. Jewell, do you have anything to do with the labor negotiations or labor problems? A. No, no familiarity with it. I am not in touch with them.

Mr. Rayson: Cross examine.

CROSS EXAMINATION

2746 By Mr. Rowntree:

Q. Mr. Jewell, Peabody Coal Company has become the largest coal company with respect to tonnage sold in the country? A. Well, I don't know. I thought we were second. I thought Consolidation Coal Company was larger. Maybe I am wrong.

Q. Do you know if Peabody has yet overtaken Consolidation or not? A. I didn't think we did this last year. I thought we ran a second close. I hope we did overtake them. We try to.

Q. Your company has been rising rapidly? A. We think rather slowly, but it has been rising.

Q. Has been rising rapidly, has it not? A. Every man for himself whether it is rapid. The figures show.

Q. You are the most mechanized company in the United States? A. I don't know that that is true. We are mechanized.

Q. You use gigantic machinery in your coal operations?

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A. Oh, yes.

2747 Q. You use water transportation? A. Yes.

Q. Your underground mine, the only one you have, is a big mine, is it not? A. Yes.

Q. What is its production? A. Approximately 4,000,000 tons annually.

Q. 4,000,000 tons a year for one underground mine? A. Yes, sir.

2748 Q. How does that rank in the country? A. It is either the largest or the second largest. I think it is the largest. The Moss Mine or Pittston might have produced a little more. They are close together this year.

Q. Your strip mines use the largest stripping shovels in the industry? A. We use as large as anybody else. I think there are others the same size—I know there's others the same size—but we use as large as anybody else.

Q. I believe you testified that you have many, many contracts across the country. A. We have many, yes.

Q. And will you tell us, are these contracts largely in the utilities area in the Middle West? A. Yes, sir, they are largely utility contracts. Yes, sir.

Q. Now, are these long-term contracts, most of them? A. Yes, sir, I would consider them long-term contracts.

Q. Do many of them involve millions of tons? A. Yes, sir. Now many of them do, many of them don't. We have all kinds of contracts, large and small, but we do have some large, long-term contracts.

2749 Q. You have many, many contracts, is that right?

A. Well, there are many. I don't know whether there are many, many or not. We have many.

Q. And you have been able to sell your steam coal at low prices because of your tremendous operations in the strip-ping fields, right? A. Well, that is a relative term "at low prices." We have been selling at lower prices than we would if we didn't have as efficient equipment as we have. There's low, lower and lowest, just as you say many, many,

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many. I don't know what you mean by "low". We sell it lower than we could if we didn't operate efficiently and didn't use efficient equipment.

Q. And as you stated, the price of steam coal depends largely on its quality. A. No, I didn't say "largely on its quality." That is one of the factors.

Q. That is one of the factors? A. Yes, sir.

Q. Will you compare the quality of the coal in your stripping areas with the quality of the coal in East Tennessee? If you know. A. Oh, I don't know well enough to do that. I expect it is pretty generally known that inherently in the seam, the quality over here is the higher quality coal, 2750 but you can drag it out by inefficient methods and make the biggest mess on earth and cleaning it, and you have got a multitude of sins, and it is too involved a subject for me to try to give a categorical answer on.

Q. Do you wash your coal that you ship to the TVA?

A. Yes, sir.

Q. Do you wash your strip coal that you sell to TVA?

A. Oh, yes.

Q. Where is your processing plant? A. Well, right at the mine.

Q. Which mine do you have a processing plant? A. All of our mines. We don't have a mine that doesn't have a processing plant.

Q. Do you have one at the River Queen mine? A. Yes, sir.

Q. How many tons do you produce at the River Queen Mine? A. I think it is in the neighborhood of two million tons a year, a little less than that, I believe.

Q. Do you have barging facilities from the River Queen Mine? A. Yes, sir.

Q. And do you sell coal from that mine to the 2751 TVA? A. Not much. Just happens we don't. We could. There's no point in it one way or the other, just happens we are not. That is not one of the mines we are primarily shipping to the TVA.

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Q. Did you not make a contract with the TVA on the term market in July, 1959, for five million, two hundred thousand tons? A. July of '59?

Q. September. A. Yeah. I believe we did, yes sir. We did. I am not sure about the date, but we made one along about that time for a million tons a year for five years, yes, sir, we did.

Q. I think that is one you overlooked a while ago in your direct testimony. A. Oh, I don't know. I didn't attempt to list all the contracts we have. I said we have some others.

Q. That is a rather small contract for Peabody Coal Company? A. No. No. No. I said we didn't have any other as large. I don't know what I said. If I said it, I am glad you correct me.

Q. Now, Mr. Jewell, this invitation for a bid from TVA on which you sold this sixty-five million tons for 2752 Paradise Plant, do you recall the language of the invitation under which you made the offer with respect to the sixty-five million tons? A. I couldn't recite it to you, sir. I could recall the sense of it, I believe.

Q. What was the sense of it? A. Just trusting to my memory. I believe it said the TVA intended to buy up to — maybe they said approximately, maybe they didn't use approximately — three million tons of coal annually, and would consider contracts of any term up to twenty years, I believe, and outlined that, and then outlined one or two descriptive paragraphs. I don't remember what was in them.

Refresh my memory if you want to with a leading question, and I will answer it.

And then in a lower paragraph it said, "In addition to above, TVA will consider other bids if operators wish to offer other tonnages for a later starting period," and outlined the starting periods.

Q. And was your sixty-five million ton bid under that language underneath there? A. Oh, I assume so. I can't

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recall the details of that. We made a bid in response to that invitation. We hoped it would be considered responsive to the invitation, and it was.

2753 Q. Now, did you carry on negotiations with the TVA after that bid was submitted? A. Yes, sir, we did.

Q. And what was the nature of this negotiations? What was discussed? A. That is a long story. There was a lot of negotiations. We discussed the desirability of them awarding us a contract, and modifications that we would make, because in the bid we set forth in the event of certain circumstances we were prepared to make certain adjustments and modifications if we didn't have to build a loading dock, if we didn't have to wash the coal, if there was some way the cost of explosives could be made less than we were now paying. All of those things had to be negotiated.

Q. And as a result of your negotiations, the TVA decided to build the Paradise Steam Plant adjacent to your property, is that correct? A. I believe that would be a fair statement. They hadn't decided just where to build the plant. They had several sites under consideration, and I think that was a controlling factor, because it eliminated transportation costs.

Q. And that will be one of the largest plants in the TVA system? A. I think so, yes, sir.

2754 Q. Now when you came into the Tampa market, Mr. Jewell, you knew at that time that the railroad shipper that was shipping coal into Tampa was seeking to obtain a reduced rail rate at that time? A. I probably knew it. It seems that I would have. I don't recall whether I did or not. I knew he was shipping some coal. I knew he had gotten a violent reduction in the rate, tremendous reduction. There was a lot of conversation about whether it would be permanent or not. Many people didn't think it could possibly last, a reduction of maybe two dollars a ton.

It looked amazing, and whether they were trying to get

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more or hold that one, there was still a lot of discussion about the rate. There is still a lot of discussion about it, and still a lot of uncertainty about it.

Q. And you knew subsequently he did obtain the contract for the supply of the requirements of the Gannon Steam Plant? A. No, I didn't know that. I didn't know it until this minute, and in fact, I am surprised to hear it. I didn't know it until this minute.

Q. You knew he had a contract? A. No, I knew he was shipping coal and was shipping coal to Tampa. Strictly never knew he had a contract.

2755 Q. The Tampa Electric Company never informed you that this shipper did have a contract?

The Court: Are you talking about Pittsburgh?

Mr. Rowntree: Talking about Love and Amos upon whose contract Phillips Brothers shipped.

The Court: All right.

The Witness: Are you sure they shipped on a contract and not just on spot orders?

Mr. Rowntree: It's in the record.

The Witness: Okay, I didn't know that.

By Mr. Rowntree:

Q. Now, West Kentucky Coal Company still wanted to use its loading facilities in Tampa and refused to lease them to you, is that right? A. It didn't have any loading facilities in Tampa.

Q. Unloading. A. No, it didn't want to use them, didn't have any business to use them on.

Q. But they didn't want to lease them out to you for any period of time? A. We got that impression, yes, sir. We weren't able to make an arrangement on them.

2755a Q. They were still interested in using those facilities? A. I don't know that they are. I don't think so. They had given notice, so they told us, and so Tampa Electric told us they were not going to stop on the contract. And Tampa Electric at that time had formally cancelled the contract for non-performance, so there was

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no indication they wanted to use them or ever expected to use them.

Q. But they were not using them at the time — A. No, nobody was using them at the time, and they were sitting there idle, rusting and it would have been better to put oil on them and used them.

Q. But they did not? A. But they did not think so.

Q. They did not want to lease them? A. No.

Q. But subsequently you did lease from West Kentucky Coal Company its river transfer facilities below New Orleans? A. Very much later; yes, sir.

Q. And those facilities have been of great advantage to you in shipping coal to Tampa Electric? A. That is debatable. Some of our people think they are an advantage and some of them don't. It is about a stand-off with 2756 loading in mid-stream. It is still in the experimental stage and it is a big enough operation that it requires six months or a year operating to reach a conclusion and I can't say whether it has been a great advantage or not. We will know in about six more months.

Q. Then you did arrive at an agreement with West Kentucky for West Kentucky to ship half the tonnage to Tampa? A. No, we did not.

Q. Do you deny that there was an understanding that West Kentucky Coal Company would ship half the tonnage on the Tampa contract? A. Yes, sir. That was not the understanding. Certainly not my understanding.

Q. What was the understanding? A. The understanding was that we made a purchase and they made a sale for an amount of tonnage which we agreed would be equal to half the tonnage of the Tampa contract. That would be the yardstick, the measure, of how much coal we would take on this order.

Did not say where we would ship it, and we have never shipped any of it to Tampa.

Q. Isn't that just a technicality? A. You decide whether

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it is a technicality or not. I have stated the facts. I don't think it is any technicality at all. We think it is very
2757 clear and explicit. We think the performance on it shows there is nothing technical about it.

If I wanted to tomorrow I would like to ship it to Minneapolis without any difficulty. It is our coal. We bought it. We did not agree to ship it anywhere.

Q. When this Memphis contract came up, when the invitations — were there invitations to bid on the Memphis contract? A. Yes, sir,

Q. When you received an invitation to bid on the Memphis contract, did you discuss that invitation with either Kirkpatrick Coal Company, West Kentucky Coal Company or Pittsburgh-Midway Coal Company before you submitted your bid? A. I don't recall we did that. We might possibly have because that was a lot of negotiations down there about selling it to them. If they could have they would have bought the coal without submitting it to bids. They were just in that mood, and they made it clear.

I don't like to talk about politics generally in court unless necessary. They wanted to favor certain people with the business, and so on.

The Court: You don't have any politics in Memphis, do you?

2758 A. (Continuing) I'm afraid they do slightly. But at any rate, I don't recall discussing it or not. We might have. It would be a little natural because down there — we run together down there and have a drink or two together and you get pretty talkative. We might have talked to any of them. The City Manager was going to buy some coal and we hope we could get it and you discuss what you do and what they do.

You can't remember every conversation which you have. Conversation after the bids were in and while negotiations were going on, and who was going to take it, and how much. The competition was so hot they split it. We had so many friends behind us all that they split it up.

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Q. It is possible you did discuss this Memphis bid? A. In a casual way. Not in any formal way. Not in any way that had any effect.

Q. Anyway, you ended up splitting up that business? A. We did not split it up. Memphis split it up.

Q. And is it not true West Kentucky Coal Company is shipping on the Peabody order in Memphis? A. Yes. I just said that is where we were putting the coal. They had been doing it for quite a while.

Q. Isn't it true West Kentucky Coal Company and/or Peabody Coal Company is shipping on the Kirkpatrick Coal Company order? A. Kirkpatrick doesn't have 2759 an order. Kirkpatrick assisted us in getting the order and promised to give us some assistance in the administration of the contract in return for which we pay Kirkpatrick a small commission.

2760 Q. In other words, you did discuss it with Kirkpatrick Coal Company? A. Why sure, we discussed it to make that arrangement. We needed his help to get the business. We used it to pay for it in a legitimate way.

Q. Upon receiving any invitation for bid from the Tennessee Valley Authority term market, have you discussed any of those invitations with any other coal company or the representatives of any other coal company prior to submitting your bid? A. Not that I know of. I don't think I have personally. If anybody in my organization has, I don't know it, but I wouldn't say we have not. Like saying to your mother, "Have you ever discussed your baby with a neighbor who has a baby?" Probably some conversation will take place, anything of such great mutual interest. I don't recall any such conversation.

Q. Have you ever gone to Chicago or any other place to participate in any such discussion? A. No, sir.

2761 Mr. Rowntree: Yes.

One further thing. We did request that Mr. Kramer, or counsel, have this witness bring records of the cost of

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water transportation to Tampa and I wonder if the witness did bring those records.

The Witness: No. I didn't know that was requested. That would be a rather difficult thing.

Mr. Kramer: No, sir. Your Honor, I did get a request from Mr. Rowntree last Saturday, I guess it was, to do that, and in the rush I overlooked it.

The Witness: I don't believe you want those, Mr. Rowntree, if I can be informal a minute. That water transportation company is owned jointly by the shipper and the receiver and that company operates without profit. I don't think either one of us knows just what the cost is going to turn out to be.

By Mr. Rowntree:

Q. Do you know the cost per million BTU? A. I don't hesitate to give you a rough guess. I think it has been running in the neighborhood of 31, between 32 or 32 and a fraction cents per million. I don't think there is any secret. I don't believe Tampa Electric Company would object.

The Court: The jury may have a seat.

A. I am not positive of that, but I am trying to give
2762 you an honest answer the best I can. We don't have any secret about it.

By Mr. Rowntree:

Q. You think it runs about 32 and a fraction? A. You are talking about the delivered coal?

Q. Yes. A. I think that is about the way we estimated it is running.

Q. About 32 and a fraction? A. You say, "Why can't you know?" We have got work to do on Myrtle Grove and we turn it back, it costs us 50,000, or 100,000 or 200,000. There are some costs held in abeyance, unknown and unascertainable for a period of time. We think we are getting close to 32½ cents a million.

Q. You have been shipping on it for a year now? A. Yes, but not by the same method by any means.

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Q. Well, you have been watching it very closely? A. Yes, but we have been shifting pretty fast from one experiment to another. You ought to be in this game. It is interesting.

Q. Why are you experimenting? A. To try to find some way to get costs down, Mr. Rowntree.

Q. Isn't it true that you are watching your cost? A. Sure.

2763 Q. All right. A. Get fired tomorrow if I didn't.

Q. What is your lowest cost? A. I am telling you. I just got through telling you we are not going to know for a year or more what the actual cost is.

Q. Your lowest cost? A. The lowest estimate, my lowest guess you want?

Q. No. You have been watching your cost. A. I told you I think it is running in the neighborhood of 32½ cents a million delivered.

Q. All right. A. Cost of coal and transportation.

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2764

T. REED SCOLLON

called as a witness by and on behalf of the cross-defendant.

* * * * *

DIRECT EXAMINATION

By Mr. Combs:

Q. Will you please state your name and professional position and location of your headquarters. A. My name is T. Reed Scollon. I am chief of the Division of Bituminous Coal, Bureau of Mines, United States Department of the Interior, with headquarters in Washington, D. C.

* * * * *

Q. Mr. Scollon, as Chief of the Division of Bituminous Coal in the Bureau of Mines, what are your responsibilities

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and scope of your activities? A. As chief of the Division of Bituminous Coal I am responsible for the direction and supervision of the Bureau's technological and economic research programs on bituminous coal.

In this capacity I have charge of a Washington staff of six coal research laboratories and an explosives research laboratory.

Q. In this capacity do you have the responsibility for the bituminous coal economics and statistical programs. I knew I would get stuck on that. A. Yes.

* * * * *

Q. Mr. Scollon, what other experience have you had in connection with your profession? A. I have had approximately ten years experience in industry as a mining engineer and as director of research and statistics for a coal association.

I have also had approximately ten years experience in the federal government in addition to my present position. I was chief of the section of Coal Mine Prices of the Office of Price Stabilization of the federal government.

Q. Would you please name some of the professional and technical groups with which you are affiliated. A. I am a member of the American Institute of Mine, Metallurgical and Petroleum Engineers; Coal Mining Institute of America; Rocky Mountain Coal Mining Institute; The American Society for Testing Materials; The Mining Standards Board of the American Standard Association; The United States National Committee of the World Power Conference.

On three occasions I have been the United States delegate to the Coal Committee meeting of the Economic Commission for Europe, a United Nations organization in Geneva. And on two occasions I have been technical advisor to that delegation.

Q. Are you here to testify as an expert or as an official government witness? A. As an official government witness.

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Q. As such witness do you have limitations that are prescribed by the regulations as to the type of testimony that you may give? A. Yes.

Q. And in what respect? A. I am limited to the presentation, explanation and discussion of statistics pertaining to bituminous coal and as it is affected by related fuels.

Q. Are you here under subpoena? A. Yes.

Q. Were you asked to make available Bureau of Mines statistics on coal? A. Yes.

2767 Q. Are these statistics available to any taxpayer?

A. Yes.

Q. Were you asked to prepare specific studies based on Bureau of Mines statistics on coal? A. No.

Q. Were you asked to explain and discuss the Bureau of Mines statistics on coal? A. Yes.

Q. Were you asked to explain anything in particular?

A. No.

Q. What then do you wish to explain? What are you prepared to explain? A. The Bureau of Mines statistics are quite comprehensive and complex. They cover a period of approximately 70 years possibly, in coal production and consumption.

I understand the year 1950 and 1958 are key years in this case. I have arbitrarily selected a decade prior to 1950 and a like period since 1950 to show trends both prior to and since that year.

Q. Do you have with you, Mr. Scollon, the mineral yearbooks of the Bureau of Mines that will contain the data that you will be expected to discuss on your charts? Are they here with you? A. Yes. All data were taken from

2768 the yearbooks—all computed from data in the yearbooks 1940 through 1958.

Mr. Combs: If your Honor please, we have these yearbooks presently here, and some of them are just a little bit difficult to obtain back to 1941. We have told counsel they are here available, and we have prepared charts that the

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witness will testify from, and each of those charts and tables will show the exact page of the section where it is taken from in these books and will be available here.

We would prefer not to introduce them in evidence, if that is all right with counsel, because they are bulky and I don't think it would add anything to it. But I just wanted to say to counsel that they are available here and if counsel would like to have any particular one introduced we will be glad to do it.

Mr. Rowntree: That is perfectly all right. I understand the witness has prepared a number of exhibits here. We will rely on the witness' figures that he has put on these exhibits.

Mr. Combs: That is true. I have given him the exhibits that we expect to have here.

The Court: You have laid the proper groundwork for his testimony.

2769 Mr. Combs: Thank you, your Honor.

By Mr. Combs:

Q. Mr. Scollon, will you tell the Court and jury how much energy does the United States consume from fossil fuels and water power? A. According to Mineral Yearbook 1959, pages 8 and 9, volume 2 of fuels, the United States in 1958 consumed 41.5-quadrillion BTU of energy, including 1.7-quadrillion BTU of water power.

I might explain that a BTU is the amount of heat required to raise the temperature of water one degree Fahrenheit. This is a unit commonly used to express energy units.

It is difficult to equate electrical power and energy from other fuels without such a common denominator.

For simplification, the 41.5-quadrillion BTU is equivalent to 1.6-billion tons of bituminous coal. In other words, if all of this energy were consumed in the form of bituminous coal, there would be consumed about 1.6-billion rather than 4-billion tons of coal in that year, 1958.

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Q. Mr. Scollon, in passing would you tell the Court and jury about how many BTUs would be contained in an average ton of coal? A. The average ton of coal in the 2770 United States contains 13,100 BTU per pound, so per ton would be 26,200,000 BTU. This is the conversion factor I use to equate the quadrillion—the 41.5-quadrillion BTUs to 1.6-billion tons of coal.

In other words, in every ton of coal there are 26,200,000 BTU.

Q. Is that the national average? A. Yes.

Q. Mr. Scollon, does that include sub-bituminous and lignite coal? A. Yes.

Q. That is the average of all coal? A. Yes.

Q. Do you have figures that show the average BTU per ton of coal in Tennessee? A. Yes.

Q. Would you give that, please.

Mr. Rowntree: Is this a consumed figure or a production figure?

The Witness: This is the average BTU of coal produced.

Mr. Rowntree: All right, sir.

The Witness: And delivered—and/or delivered to the customer.

The average shown in the Bureau of Mines Information Circular 7538 entitled "Average Heating 2771 Value of American Coals by Rank and by State" shows the average for Tennessee high volatile bituminous coal is 13,460 BTU per pound.

2772 By Mr. Combs:

Q. What did you say the national average is so we will have the two together? A. The national average for high volatile coal, I mentioned high volatile for Tennessee—the average U. S. value for high volatile coal is 12,900 BTU.

Q. Would you mind explaining to the jury and to the Court what is high volatile coal?

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The Court: Now, Mr. Combs, while he is on that subject, let's let him translate 13,460 BTU per ton in Tennessee.

By Mr. Combs:

Q. Would you do that, please. A. 13,460—that would be 26,920,000 BTU's per ton.

Q. As compared to 26.2 did you say? A. Million.

Q. Of the national average? A. Yes.

Q. Of all? A. Of all coal. I did not give you a comparable figure for high volatile U. S.

Q. I see. Could you do that? A. Yes. 25,800,000 BTU per ton of high volatile coal in the U. S., the average.

2773 Q. Now, Mr. Scollon, would you explain just what you mean by high volatile coal? What does that mean? A. This is coal which contains a volatile content of 32 per cent and more.

Q. I see. A. There are generally three breakdowns, low volatile, medium volatile and high volatile bituminous coal. All coal below 23 per cent volatile is considered low volatile. 23 to 31, inclusive, is medium volatile, and 32 per cent and above is high volatile coal.

Q. Mr. Scollon, I think we would be interested, what do you mean by volatile in relation to this? Is that the BTU? A. Volatile is the gaseous material that comes off of coal upon burning. There is a standard laboratory test to determine volatile matter. Stated another way, the moisture in coal, the ash in coal, the fixed carbon in coal and the volatile matter in coal add up to 100 per cent. So that when we mention a 34 per cent volatile coal, for example, that is a coal which when burned under certain conditions will lose approximately 34 per cent of its weight by the evolution of volatile matter.

Q. Would you, Mr. Scollon, describe the growth in the United States of energy consumption say from 1940
2774 on up through to 1958? A. Would you repeat the question, please?

Q. My question was, I just wanted to know about the per

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cent of the increase of fuels on an average annually from 1940 say through 1958. Has there been an increase in the consumption of energy during that time, and, if so, how much? A. Yes. In 1940 a total energy consumption was 23.9 quadrillion BTU's, compared to the 41.5 quadrillion BTU's for 1958. This is an increase of approximately 75 per cent during this period.

Q. Now what are the major sources for this energy that is consumed that you are describing, what are the major sources? A. Could we have Chart 1 and I think this would show better.

Mr. Combs: Yes, we have some charts here, your Honor. The Court, Yes, sir.

Mr. Kramer: I wonder if before that is marked as an exhibit, your Honor, if we might mark the graph that is over there that we used yesterday—give it a number so it could be identified in the record?

The Court: Yes.

Mr. Kramer: We will ask the reporter to give a number for the graph already on the blackboard that was referred to in the testimony of Mr. Jewell.

2775 (Exhibit No. 145 was marked for identification and filed.)

Mr. Kramer: And while you are there, mark this other chart with the next number.

(Exhibit No. 146 was marked for identification and filed.)

Mr. Combs: We have another one, a table, which will accompany the chart, and would like to make it a collective exhibit all the way through and coordinate it.

Mr. Kramer: Mark it 146 and 146-A.

The Court: Yes.

Mr. Kramer: The graph here, whatever we call it, will be 146 and this table will be 146-A. The Court: All right, and then the next one will be 147 and the table 147-A.

Mr. Combs: We would like to offer these tables and charts.

The Court: They are received as evidence.

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(Exhibit No. 146-A was marked for identification and filed.)

2776 Mr. Combs: Your Honor, we have a table that counsel has copies, and we have twelve sets of tables. The pages are numbered one through nine, and they will correspond to the charts. There we have table "A", "B" and "C", and we have them here in sets, and if we could introduce them at the same time and give them to the jury, I think it would save time.

The Court: You may do so.

(Exhibits 147a, 148a, 149a, 150a, 151a, 152a, 153a, and 154a, were marked for identification and entered into evidence.)

2777 By Mr. Combs:

Q. Mr. Scollon, we are referring to Exhibits 146 and 146a, tables and charts entitled "United States Consumption of Energy Fuels and Water Power, Per cent of BTU's from 1940 to 1959."

What is the source of the figures that you use in the table contained in the chart? A. This is the 1959 U. S. Bureau of Mines "Mineral Yearbook," Volume II, entitled "Fuels", pages 8 and 9.

2779 Mr. Rowntree: If your Honor please, may I suggest that we eliminate the question with respect to source in order to save time, because I think each chart has its source.

Mr. Combs: Yes.

By Mr. Combs:

Q. Now Mr. Scollon, with the Court's permission, I would like for you to explain the charts and the table, the changes since 1940 in these energy sources.

Q. Would you go ahead, Mr. Scollon. A. As I mentioned earlier there was an increase in the total amount of energy from 1940 through 1958 of about 76 per cent. This repre-

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sented an annual rate of growth of energy consumption in the United States of 4 per cent.

2780 For comparative purposes I have prepared this chart to show the portion of the total market of each of the major energy sources in each of the years 1940 through 1959. I used 1959 because we had data through that year, but I will cut off at 1958 in my discussions.

You will notice that in 1940 bituminous coal had 47 per cent of the total market for energy; that reached a peak of 51 per cent in 1943, and has shown almost a continual drop-off since that time. Such that in 1958 it represented, coal represented only 23 per cent of the total energy consumed in this country.

Now anthracite has been falling off gradually. I would like to apologize for a typographical error under the column "Anthracite" for 1943. That should be 4.8 instead of 48.8.

Anthracite comprised 5 per cent of the total and has dropped to one per cent in 1958.

Now both bituminous and anthracite coal have been somewhat squeezed by the inroads of petroleum and natural gas:

Petroleum in 1940 comprised 31 per cent of the total energy, and it now comprises 42 per cent — in 1958 comprised 42 per cent.

2781 Natural gas probably has made the greatest change in this two-decade period, representing 12 per cent of the total energy consumed in 1940 and now representing 30 per cent.

On a combined basis petroleum and natural gas, in 1940, represented 44 per cent of the total energy market — almost the same as coal, just a little under — but in 1958 it represented 72 per cent of total production.

Now water power has remained relatively constant as a percent of the total. If you will remember, however, there has been a gradual increase of about 4 per cent per year in energy consumption, which means that the energy consumed

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from water power has been rising at about the same rate as the total energy picture.

Another way of looking at this, if in 1958 coal still had 47 per cent of the market that it had in 1950, the industry would be producing three-quarters of a billion tons of coal—almost double the production today.

Q. Mr. Scollon, could I ask a question? A. Yes, sir.

Q. In relation to the petroleum, does all this petroleum enter in competition with coal? A. No, sir. Only about one-third of the petroleum enters into direct competition with coal as a fuel, a power fuel. Two-thirds of it is for mobile units, such as automobile and airplanes, and so forth.

2782 Q. Go ahead. A. I think that finishes. I think I am finished, unless there are some further questions.

Q. All right, thank you.

Mr. Scollon, could you tell the Court and jury what brought about the changes in this energy consumption during this period of time? A. Well, basically, the intensified competition between and among the fuels, the technological changes in production, in preparation, in transportation, and in consumption of fuels have had a significant effect on the picture during this 20-year period.

For example, the use of gasoline, the requirements of gasoline for motor car use develop additional products such as diesel fuel, kerosene, fuel oil, residual fuel, which creates further competition for coal.

The development of long distance pipelines made natural gas available on a country-wide basis. The use of petroleum products and natural gas, as the chart indicates, is primarily the basis for the decrease in bituminous coal consumption.

Q. Mr. Scollon, has there been improvements in the efficiency of consumption of these fuels during this period of

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time? A. Yes, there has. In almost all cases the technological changes also affect the consumption in another way, that is, in the improvement in burning or producing.

An example is in the amount of coal required to generate a kilowatt hour of electricity. In 1940 there were required about one and one-third pounds of coal per kilowatt hour of electricity. In 1958 this had dropped to nine-tenths of a pound of coal. Just in this period of time there had been a significant decrease in the amount of coal required to generate a kilowatt hour of electricity.

Q. Does this increased efficiency tend to increase the amount of fuels available and therefore increase the competition between the fuels? A. Oh, yes.

Q. Now you spoke of residual oil a while ago. Would you explain what residual oil is. A. In refining crude petroleum to get gasoline, diesel oil and the other products, the last product to come off is residual oil. It is what is left over. It represents a small portion of the United States refinery experience today.

Again technological changes have decreased the amount of residual fuel oil, but on the other hand there have been substantial amounts of residual fuel oil imported and it is a product which can be, and is, sold at a very low price.

Usually just to undersell coal.

2784 Q. Can that be used as steam coal? I mean, for steam purposes? A. Yes, it is.

Q. What are coals principal markets? A. Coal's principal markets are for the generation of electric power; for coke, the manufacture of coke; for general industrial use; for retail use, and railroad locomotive fuel.

Q. Have you prepared a chart and table to show the markets in which coal has lost its position in the energy markets? A. Yes, I have.

Mr. Combs: That is Table 2, your Honor, and that will be 147, and 147.

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Mr. Kramer: 147-A has been marked but not 147.

(Exhibit No. 147 was marked for identification and filed.)

Mr. Combs: If the Court and jury will refer to Table 2 that they have.

By Mr. Combs:

Q. Mr. Scollon, will you explain this chart and table, please? A. Here again I have prepared a chart on the hundred per cent basis. This is the per cent of consumption in each of these categories. And I might mention to begin with, in 1940 the total consumption of coal, represented as a hundred per cent on this end of the chart, was actually about 420-million tons; whereas, in 1958 the 100 per cent is actually under 367-million tons, or only about 85 percent of the consumption back in 1940.

Now in the industrial category the amount—30 per cent of all coal is used for general industrial use, for heating, steam, and so forth, in 1940. This has dropped to 27 per cent in 1958.

Coke, both by-product coke and coke, coal consumed in this category represented 19 per cent in 1940. It was 21 per cent in 1958. It had a slight increase in the early 1950's.

The greatest change which has taken place is coal in the electrical utility category, rising from 11 per cent of the total in 1940 to 42 per cent of the total in 1958.

On retail deliveries there has been a substantial decrease, from 20 per cent — I am rounding these, by the way, if you are watching a chart — from 20 per cent in 1940 to — I am sorry — yes, to 8 per cent here in 1958. This is a decrease of almost 50-million tons annually from this period to this period.

The greatest loss, as most of us know, has developed in the railroad fuel area.

2786 Q. What caused that loss, Mr. Scollon? A. The inroads of diesel fuel. In 1940 the railroad's locomotive fuel market represented 20 per cent of the total and it is down to one per cent in 1958. This tonnage, in actual tons,

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dropped from 85-million tons in 1950 to less than 4-million tons in 1958.

2787 Q. Mr. Scollon, will you resume your seat. Are you through with the chart? A. Yes.

Q. Mr. Scollon, what type of fuel, I mean coal, what type of coal do the railroads use, steam coal? A. All types. They can use all types of coal.

Q. But what do they generally use as your chart shows? A. I don't understand the question. As coal becomes available, say, from other markets —

Q. Excuse me. Counsel suggested that I get to the point. What I'm trying to do, Mr. Scollon, is to find out the grades of coal, premium coal, or steam coal, or what kind of coal that each one of these particular consumers use. I first asked you what grade and what type of coal that the railroads use. A. As a rule, steam coal.

Q. Now what type of coal do the utilities use? A. Steam coal also.

Q. And the coke products? A. This is a special high grade coal, specially for coking purposes.

Q. Now under the industrials, what type of coal do they use? A. That is generally a steam coal.

2788 Q. What about the steel industry, is that included in the industries? A. Yes, it is.

Q. With reference to the value per ton of coal, how do you grade that? Is steam coal cheaper than the metallurgical coal? How does the bureau classify the types of coal? A. We have no breakdown as to class of coal, that is steam coal, directly. We do show a value per ton of coal sold on the open market and captive coal. Now on a nation wide basis, much of that captive coal is coking coal and there is a decided difference in the value per ton of that coal.

Q. Would you tell the jury while you are looking for that, what do you mean by captive coal? A. Captive coal is coal that is produced and consumed generally by a company

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which manufactures goods. In other words, the coal does not enter into the open market. It is not sold on the open market. A large steel company produces captive coal — it can also buy coal — the coal it produces for its own use. Railroads do the same and other types of large industry will produce its own coal for its own use.

Mr. Rowntree: If your Honor please, in order to determine the competency of this price figure he is 2789 about to give, may I ask the witness two or three questions?

The Court: Yes, sir.

Mr. Rowntree: You are saying, Mr. Scollon, that these figures you have with respect to coking coal and what other category?

The Witness: Steam.

Mr. Combs: Coking, steam and metallurgical.

Mr. Rowntree: Coking and metallurgical are the two categories you are about to —

The Witness: No, sir.

Mr. Rowntree: Which categories?

The Witness: I was going to distinguish between the value of coal sold on the open market and the value of captive coal.

Mr. Rowntree: I see. And the captive coal is not sold on the open market?

The Witness: That is correct.

Mr. Rowntree: And the captive coal is quite often mined by the same company that uses the coal?

The Witness: That is correct.

Mr. Rowntree: And the captive coal may be mined by a subsidiary of the user of the coal?

The Witness: Yes.

Mr. Rowntree: So the circumstances with respect 2790 to this price figure you are about to give, are not the same circumstances that relate to sales on the open market?

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The Witness: That is correct.

By Mr. Combs:

Q. Would you continue, please, and refer to those tables.

A. In the 1958 yearbook the average value per ton for all coal sold in the open market in the United States was \$4.58, and the average value for coal not sold in the open market was \$6.41.

Mr. Rowntree: May I ask one more question?

The Court: Yes, sir.

Mr. Rowntree: That value is not a buying and selling price?

The Witness: It is in effect the f.o.b. mine price for coal sold in the open market, but not for the captive coal.

Mr. Rowntree: That is right.

By Mr. Combs:

Q. Would you continue, please? A. That is all I had. I just merely wanted to make the comparison.

Q. Now in the national average value of coal, did you say that that included bituminous and lignite? A. 2791 A. Yes, it does.

Q. Now how much of the total production does lignite have, what percentage?

Q. Now how much of the total production does lignite have, what percentage? A. The actual tonnage I have before me was 2.4 million tons in 1958, so that would be 6/10ths of one per cent.

Q. Is that coal sold generally over the United States—A. No, it is not.

Q. Or confined to a limited market? A. No, it is not.

Q. What about the sub-bituminous, what percentage would that have of total production? A. I don't have that figure before me, but it is a very small percentage also.

Q. What is sub-bituminous as distinguished from lignite? A. Sub-bituminous is a step nearer bituminous coal. In other words, it has a little more carbon content. It is gen-

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erally a higher grade coal. It is between lignite and bituminous in rank.

Q. Does it have a very limited market? A. Pardon?

Q. Does it have a limited market, sub-bituminous coal?

A. Yes, relatively limited, yes.

2792 You mentioned exports in your discussion of consumption. Have you prepared a table showing a picture with respect to bituminous coal exports? A. Yes, I have.

Q. And that would be Table A? A. Table A. It shows U. S. exports of bituminous coal in each of the years of the period we are discussing.

Mr. Combs: We have three additional tables, your Honor, that we would like to pass out at this time, A, B and C.

Mr. Kramer: They will be 155-A, 156-A and 157-A.

(Exhibits No. 155-A, 156-A and 157-A were marked for identification and filed.)

By Mr. Combs:

Q. Mr. Scollon, would you explain to the Court and jury the picture that this table shows with relation to bituminous coal exports? A. Yes. Another category in which bituminous coals enter into competition is in the export market. This was not included in the chart I just referred to, but the export coal market has had a significant effect on coal markets over the years.

If you will refer to the last column, the total
2793 column, you will note that in 1940 approximately 16 million tons of coal was exported to the world. This reached a level of 25 million approximately in 1950 and a peak of 76 million tons—

A. The peak in exports was about 76 million tons.

By Mr. Combs:

Q. In what year? A. In 1957. In 1958 this dropped to 50 million tons. If you will look at the column under Europe,

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you will note that as would be expected during the war years, the exports were extremely low, and beginning in 1945 there was quite an increase, by 37 million tons in 1947, and this was because of Europe's recovery. This then dropped off to less than a million tons in 1950. By that time the European mines were back in shape. However, although they had recovered substantially to produce their own coals, they did not have enough to take care of the economic upturn that then occurred in Europe, so that in 1951 the exports of the United States coals to Europe was up to 28 million tons, and then again this began to decrease, and decreased to 1953.

Then a further increase. There have been these
2794 economic resurgences in western Europe, where they could not take care of all their energy requirements from indigenous coals.

The only other significant item is under Canada. Whereas the exports had been running in the late 40's and early 50's at about 20 million ton level, they are down in 1958 to about 12 million tons. This is a result of Canada using its own coals, its indigenous coals, and the placing of subventions on U. S. coals.

Q. Mr. Scollon, have you finished? A. Yes.

Q. What do fluctuations in exports on these other markets have on the competition of coal? What effect does that have? A. Well, as the export demand drops, this places more coal on the open market and in competition with other coals. This is the same, the same situation as when coals are displaced by other fuels. It just places more coal on the open market.

Q. Does that increase the competition between the coal companies, the coal operators? A. It does.

Q. In other words, it is too much coal? It increases the amount of coal for the market? A. Yes.

2795 Q. Mr. Scollon, you have shown the growth and the energy demand of the United States in the last

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two decades and you have also shown that bituminous coal did not share in this growth in these charts. You have prepared a table that will show the effect on the United States coal industry of these changes? A. Yes, I have.

Q. What table is that? A. Table B, salient statistics on bituminous coal in the United States, 1940-1958.

Mr. Kramer: What is that exhibit number? That is 156-A.

2796 By Mr. Combs:

Q. Mr. Scollon, would you continue? A. Yes, I would just like to cover a few highlights on this table. Production in the year 1940 in the second column.

Q. All right, sir. A. And the column under production you will note that in the United States production of coal in 1940 was about 461,000,000 tons. This reached a peak in 1947, an all-time peak of 631,000,000, and has dropped off to the present production of 410,000,000 tons.

Average value per ton is increased from \$1.91 in 1940, to five dollars—I'm sorry, to \$4.86 in 1948. The high point was \$5.08 in 1957, but otherwise, you will note the relative constancy of the price over the past ten-year period.

Number of mines increased from 6,300 mines in 1940 to 9,400 mines in 1950, and has dropped to 8,300 mines in 1958.

2797 The average number of men working daily, there were 439,000 men employed in 1940, reaching a peak of 462,000 in 1942, and in 1958, there were 197,000 men employed.

Average tons per man per day has increased from 5.19 tons in 1940 to 11.33 tons in 1958.

The average number of days worked were 202 days worked in 1940; the peak of the period is shown in 1944 of 278 days; in 1958, 184 days were worked.

Now most of the remaining material is on subsequent charts, so if I may skip that, I would suggest that.

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Q. All right, I think that will shorten it. Now, Mr. Scollon, did you prepare a table showing these statistics in Tennessee? A. Yes, Table C, Salient Statistics on Bituminous Coal in Tennessee, 1940-1950.

Mr. Combs: That will be 157-A, Your Honor.

It is Table C.

By Mr. Combs:

Q. Would you please explain this table, Mr. Scollon? A. In the production column in 1940, Tennessee produced 6,000,000 tons of coal. The peak production was 1956 with 8.8 million tons, and in 1958 there was produced about 6.8 million tons.

2798 The average value per ton increased from \$2.00 in 1940 to \$3.83 in 1958. The high point was in 1948 when \$5.74 was the average value per ton.

The number of mines increased from 124 in 1940 to 500 in 1958. In 1950 there were 133 mines.

The average tons per man per day in Tennessee was 3.38 in 1940, and 8.22 in 1958.

Q. What was it in 1950? A. In 1950, the average number—or the average tons per man day was 4.67.

The average number of days worked, 208 in 1940, 168 in 1950, and 141 in 1958.

And again, I would suggest I eliminate the last few columns.

Q. The other statistics will be on subsequent tables and charts? A. Yes.

Q. Mr. Scollon, are these conditions reflected in coal producing area or coal producing states? A. I didn't understand.

Q. Are these conditions reflected in each coal producing area and each coal producing state? A. What I have shown are the trends in the United States and Tennessee.

Q. Right. A. The other states vary in different 2799 degrees.

Mr. Rowntree: May I inquire if that question just relates to these last two charts?

Mr. Combs: Yes.

The Witness: To Tables B and C, yes.

By Mr. Combs:

Q. Mr. Scollon, do you have a chart that shows the trend of production of coal in Tennessee compared with the trend of production in the United States? A. Yes, I have.

Q. Do you have tables that reflect it also? A. Table Three reflects the information on the chart.

Mr. Kramer: I think the way we have introduced that, it should be numbered 158, then we will have some with an "A", but we will have it consecutive, Your Honor.

(Exhibit No. 158 was marked for identification and filed.)

By Mr. Combs:

2800 Q. Now, Mr. Scollon, referring to the chart, Number 158, and Table Number Two, 147-A, would you please explain that chart?

A. Since 1950—as a base here in this case, I have selected this as an index of one hundred in production in the United States, and in Tennessee. In other words, whatever the production was here, it was a hundred per cent for the United States and for Tennessee.

In the United States, you will notice that in the year 1940, the total production was only 89 per cent of what it was in 1950, and only two years was it below the hundred per cent line, black line here.

Q. Speaking of these lines, Mr. Scollon, so it will be clear, the United States production is shown by the blue line?

A. The blue line shows United States production, yes, sir.

Q. And the red line shows Tennessee? A. And the red line shows Tennessee.

Q. All right, sir. A. So with the exception of these
2801 two here, the United States production in each of the other years was above what it was in 1950. Subsequent to 1950, there was only one year, the year 1951,

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in which the production in the United States was higher than it was in 1950. At that time it was 103 per cent, but in all other years, although there was an upsurge from 1954 to '56, there was a further decline, and it hasn't yet reached the 100 per cent line.

In the case of Tennessee, in only one year also prior to 1950 was the production below the 1950 level, and at all other points, it was higher than the 1950 level.

Subsequent to 1950, in contrast to the United States picture, production in Tennessee has been above the 1950 level. It reached a peak of about 175 here in 1956, and it has dropped off considerably since that time, but it is still 17 per cent above the 1950 production.

(Witness resumes stand.)

Q. Now, Mr. Scollon, do you have charts to show the production, the number of mines operating and other information by the size of coal mines? A. Yes, I have. By size, the Bureau of Mines has a standard breaking point of production per year which we can use as size of mine, but the Bureau breaks the size—the production according to six classes: the mines that produce over 500,000 tons annually; the mines that produce between 200,000 and 2802 500,000 tons referred to as Class 2; and the—

Q. I believe, Mr. Scollon, it would be better to get this chart marked.

(Exhibit No. 159 was marked for identification and filed.)

Q. All right, sir. A. Each year the Bureau classifies mines according to one of six classes; according to the size of the annual output.

Class 1, which in this chart is the red, are the mines that produced 500,000 tons or more annually;

Class 2, the blue, represents mines that produce between 200,000 and 500,000 tons annually;

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The orange, Class 3, produced between 100,000 and 200,000 thousand;

2803 The yellow, Class 4, produced between 50,000 and 100,000 tons annually.

The green, Class 5, produces between 10,000 and 50,000; And Class 6, less than 10,000 tons annually.

I think I should mention at this point that not included in any of our statistics are mines that produce less than a thousand tons a year.

This chart shows the per cent of the total production by each of these classes of mines.

In 1940, the largest class, the class producing 500,000 tons or more, represented 46 per cent of the total production. In 1950, this had dropped to about 36 per cent, and in 1958 was 45.7 per cent, exactly the same percentage of the total that it represented back in 1940.

In Class 2, the next larger size, it was 27 per cent in 1940, 27 per cent—that is the difference in the vertical distance—27 per cent in 1955, and 21 per cent in 1958.

Class 3, 1940, was 13 per cent, 14 per cent in 1950, and ten per cent in 1958.

In Class 4, it was 6 per cent in 1940, ten per cent in 1950, and 11 per cent in 1958.

2804 I think I gave a wrong figure. I am going to repeat that to make sure.

Under Class 4, 1940 was 5.8, 1950 was 8.6, and 1958 was 6.9.

Under Class 5, 5.8 in 1940, 10 in 1950, and 11 in 1958.

Under Class 6, 2.7 per cent in 1950, 4.2 per cent in 1950, and 4.7 per cent in 1958.

If an arbitrary break is made at 100,000 tons—if you combine these three, the total of these three in 1948, represents about 86 per cent of the total.

Q. Which three are you talking about? A. Of the largest three classes. Classes 1, 2 and 3.

Q. All right, so it will be in the record. A. Represented

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86 per cent of the total in 1940, 77 per cent—that is the total of these three—77 per cent in 1950, and also 77 per cent in 1958.

Alternatively, the three smaller classes were 23 per cent in 1950, and 23 per cent in 1958 of the total production.

Q. Mr. Scollon, is it true that under this classification that a mine may be under one classification one year and under a different classification the next year? A. Yes. A mine can produce, for example, 510,000 tons in this year and be in the red class, and the next year 490,000 2805 tons and be in the blue class. So they are not identical mines in each year.

Q. Does this fact result sometimes in the trend—cause a trend we are talking about in moving of one mine to another classification? A. Yes, it would.

Q. Have you prepared a chart, Mr. Scollon, to show a breakdown of the size of mines in the State of Tennessee? A. Yes, I have.

Q. Do you have a table that shows that? A. Yes, Table 5.

Q. Which would be Exhibit No.—

Mr. Kramer: Table 5 is Exhibit 150-A.

Q. (Continuing)—150-A, and referring to Exhibit 150-A would you please explain this chart, Mr. Scollon.

(Exhibit No. 160 was marked for identification and filed.)

A. This is the same type breakdown. We show 2806 for the United States all the same classes, and again this is the percent of coal production by class, by size class.

You will note that in this case there are only three years in which the mines during this period and which mine was in, produced 500,000 tons or more annually.

In Class 2 in 1940 about 49 per cent of the total production came from mines producing between 200,000 and 500,000 tons.

In 1950 this had dropped to about 20 per cent, and in 1958 was about 24 per cent.

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Class 3 represented about 25 per cent of the total production in Tennessee in 1940; about 38 per cent in 1950, and only less than 4 per cent in 1958.

Class 4 mines produced about 15 per cent in 1940, about 25 per cent in 1950—24 per cent, I am sorry, in 1950—and 20 per cent in 1958.

Class 5 mines—these are the mines that produced between 10,000 and 50,000 tons—

Mr. Combs: I might say, I believe that is the class that the plaintiff is in, your Honor.

The Court: Is it? All right.

Mr. Combs: I think that is true.

Mr. Rowntree: The Class 5?

Mr. Combs: Yes.

2807 Mr. Rowntree: Correct.

The Court: What is the number in that class?

A. (Continuing) The total tons in Class 5 is between 10,000 and 50,000 tons annually.

The Court: Yes, sir.

A. (Continuing) In Class 5, in 1940 the mines produced 8 per cent of the total; in 1950 they produced 14 per cent of the total, and in 1958 produced about 31 per cent of the total.

In Class 6, the mines producing less than 10,000 tons a year, in 1940 less than 4 per cent was produced in this class, and about 5 per cent in 1950, and about 22 per cent in 1958.

Again arbitrarily adding the first three groups here, we have only two—groups 2 and 3—in 1940 they produced about 74 per cent of the total production; in 1950 they produced about 58 per cent of the production, and in 1958 they produced 28 per cent of the total.

On the other hand, the mines, combining all mines less than 100,000 tons, in 1940 it was 26½ per cent of the total production by this group; in 1950, 42 per cent of the total,

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and in 1958 the three smaller groups produced 72 per cent of the total.

Q. Mr. Scollon, will you explain to the Court and jury why 1954 is vacant? A. In the year 1954 the Bureau of Mines did a joint survey with the Bureau of the Census, Department of Commerce, and because of their disclosure rules, that is, they did not want to disclose the nature of a few mines by a report of something that might be identified, we were permitted to publish anything but mine size in this year. We have the total but no breakdown by sizes.

Q. Have you finished? A. Yes.

Q. Do you have a chart to show the trend in the number of mines in each of these size groups since 1940? A. Yes, I have.

Q. Is that Table No. 6? A. Yes.

Q. That would be Exhibit 151-A. A. Yes.

(Exhibit No. 161 was marked for identification and filed.)

Mr. Kramer: This chart of classes you are now filing is No. 161.

By Mr. Combs:

Q. I am referring to Table No. 6 and to the figures. Will you please explain the table and chart, Mr. Scollon. 2809 A. Both the table and the chart show the number of bituminous coal mines by size of annual output in the United States in the years 1940 through '59. These represent the same size classes we talked about on the last two charts, but in those other cases we were talking about the percentage of total production. In this case we are talking about number of mines actually in operation.

The solid black line at the top represents the coal mines in operation. We might discuss this one first. You will note that there were a total of 6,324 mines in 1940. This reached a peak in 1950 of 9,492 mines, and in 1958 was 8,264 mines.

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The Classes 1, 2, 3 and 4, all fell in this lower class and overlapped so that as you will note these are measured in the hundreds of mines and the number of mines in the large classes has been relatively constant during these years.

Class No. 5, 10,000-50,000, in 1950 showed 1,157 mines. In 1950, again the peak, 2,367 mines, and in 1958, 2,169 mines.

The great changes in the slope in the total curve is affected mostly by the changes in the number of mines in Class 5 and Class 6. In Class 6 the number of mines in 1940 was 3,728. A peak also in 1950 of 5,252. In 1958 the number of mines in operation was 4,927.

2810 Q. Mr. Scollon, did you prepare a chart and table to show the number of mines in the various sizes and operation in the State of Tennessee? A. Yes, I have, Table 7.

Mr. Combs: That would be Table 7, your Honor.

Mr. Kramer: That is 152-A.

(Exhibit No. 162 was marked for identification and filed.)

By Mr. Combs:

Q. Mr. Scollon, would you explain Table No. 7 and Chart No. 7, Table 152-A and the Chart 162, please. A. On this chart we show a comparable trend for Tennessee, or rather comparable information that we had shown on the preceding chart for the United States. The same explanation for the year '54 applies here as applied on the production chart.

As was true in the case of the United States, the first four classes, the largest four classes, 1, 2, 3 and four, represent a very small number of mines, and they are for all practical purposes relatively constant on this chart.

The green line, Class No. 5, 10,000-50,000, showed 21 mines in operation in Tennessee in 1940. This class, there
2811 were 30 mines in 1950 and there were 97 mines in 1958.

Class 6 mines, 71 in 1940, 68 mines in 1950, and 376 mines in operation in 1958.

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All mines in Tennessee were 124 mines in operation in 1940, 133 in operation in 1950, and 500 mines in operation in 1958.

You will note again, as was true in the United States, the smaller two classes of mines have more effect on the total line than the other four.

Q. Resume your seat, please. Mr. Scollon, what has been done by the coal industry to enable it to hold as high a share of the energy market as it has in its competition with oil and natural gas? A. Among other things, it has mechanized to the extent possible. That is to the extent that natural and geological and other conditions would permit.

Q. Do you have a table and a chart that would reflect that? A. Yes, I have.

Q. And that is Table 8? A. Yes.

Q. And Chart No. 8? A. Yes.

(Exhibit No. 163 was marked for identification and filed.)

By Mr Combs:

2812 Q. Mr. Scollon, would you take your place at the chart. Now you are referring to Exhibit 163? A. Yes.

Q. Go ahead please. A. Here we show the breakdown of mining by types of mining, by underground coal mechanically loaded, by strip or surface mining, by auger mining, and by hand loading. These are the prominent methods of loading coal today.

Auger mining, I might explain, is the use of an auger into a horizontal coal seam to bore out the coal. It is relatively new, as you note here. It just came in—first reported in 1952.

In 1940, 32 per cent of all coal in the United States was loaded mechanically. 9 per cent was loaded by strip, and 59 per cent was hand loaded.

In 1950, 53 per cent was loaded mechanically underground, 24 per cent by strip and 23 per cent hand loaded.

In 1958, 59 per cent of all coal was loaded mechanically underground, 28 per cent strip, 2 per cent auger, and 11 per cent was hand loaded.

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You notice the rather general trend in the increase in mechanical loaded tonnage up to about 1955. Also the total amount that is loaded by hand, loaded by strip and 2813 auger method, a general increase until about this period, and it has leveled off somewhat in the last three years shown.

Q. Do you have a chart and a table that will show the same information with reference to the State of Tennessee? A. Yes.

Q. Is that Chart No. 9? A. Yes.

Q. And Table No. 9? A. Yes.

Mr. Kramer: Table 9 is 154-A.

(Exhibit No. 164 was marked for identification and filed.)

By Mr. Combs:

Q. Now, Mr. Scollon, referring to Chart No. 9, which is Exhibit 164, and referring to Table No. 9, which is Exhibit 154-A, would you please explain the chart and table? A. Again we have made the same breakdown that we have made for the United States. Underground coal mechanically loaded in Tennessee was 12 per cent of the total in 1940. It was a negligible amount, not enough to put on the chart in that year of strip coal. Underground production hand loaded was 88 per cent. In 1950 mechanically loaded coal represented 38 per cent of the total, but had dropped from a peak of 47 per cent in 1948, and strip coal 2814 represented 12 per cent in 1950, and underground hand loaded was 50 per cent of the coal in 1950.

In 1948, 29 per cent of the total was mechanically loaded underground. 29 per cent was strip and 7 per cent was auger. Leaving 35 per cent of the total loaded underground by hand.

The only similarity in the recent year, in the year 1958, with the United States is that the combined strip and auger mining in Tennessee represented 36 per cent of the total and the combined strip and auger in the United States represented about 30 per cent of the total.

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Q. Would you take your seat, please.

Mr. Scollon, I note that in the State of Tennessee the per cent of coal mined in the strip and auger represents about the same portions of the total as these methods of mining show for the United States. Why on the other hand has the per cent of coal loaded mechanically underground in Tennessee not kept pace with the underground mechanization in the United States? A. There are many things that affect the ability to load coal mechanically. Among others are the physical condition of the coal seams, thickness and other factors have a great effect.

In this respect, I would like to refer to page 46 of the 1958 Minerals Yearbook. This shows that Tennessee 2815 see, that 77 per cent of the coal mined in Tennessee in 1955 was less than four feet in thickness, whereas the average for the United States, 34 per cent of all seams mined was less than four feet. Of the ten leading coal producing states, Tennessee had the highest percentage of coal mines in seams of less than four feet thick.

Q. Mr. Scollon, do you have under your jurisdiction research programs for the coal industry? A. Yes, I have.

Q. Would you describe briefly for the Court and the jury what type of research you are making and why you are making it? A. The Bureau of Mines is engaged in coal research, in mining preparation, conversions and utilization. It has at present several major projects designed to assist the coal industry. These are the development of a coal burning gas turbine for use in electric utility plants and hydraulic mining of coal.

The research effort in the United States has been relatively small compared with research in other countries. During the past five years the United States Congress has held many hearings which resulted in the enactment of legislation last year to create a new office of coal research in the Department of Interior, which would make

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2816 available more money for coal research, which money could be contracted to both government and non-government sources.

There is a great deal of interest nationwide in expanding on coal research. In addition to the Bureau of Mines program, an expanded program is being developed by the industry. A new coal research laboratory is being constructed this year in Pittsburgh.

By way of comparison, in 1955, a survey was made to show that about 17 million dollars annually was spent for coal research in the United States. This compares with about 250 million dollars spent for petroleum research and over 300 million for chemical research. The reason for the relatively low expenditure for coal has been given in the hearings as the fact that the profits in the coal industry have been too low to warrant a program of any size.

2817 And therefore it was concluded that the United States Government would have to make money available and thus the creation of the new Office of Coal Research in the Department of the Interior. The type of research they will be geared to do and to sponsor should be short-range, large-scale research.

Q. Why is that? A. Because the money available generally to the Bureau of Mines and other groups to date has been relatively small, and large-scale, pilot-plant type research is very costly. The money has not been available to do it.

Q. Is this research designed to increase the uses and the markets for coal in order to increase employment and to protect the national security? A. Yes, it is. I mentioned only two relatively large projects the Bureau is engaged in. We have literally hundreds of projects to develop liquid fuels from coal, gaseous fuels, chemicals from coal, and in addition to new uses, to develop new mining methods to lower mining costs.

The possibility of supplementing our natural gas supply in the not too distant future is — well, there is a great

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possibility that we might have to convert coal to high BTU gas in the not too distant future. We know how to do it technically now, but economically, it is still out of the picture.

2818 Q. In comparison to reserves of fuels, how does coal rank along with the other fossil fuels you have been discussing? A. It is difficult to explain reserves without a — with a proper — in this short time, but let me say this. At the present rate of consumption, there are proved reserves of coal for about seventeen hundred years.

Now, oil and gas reserves are not measured the same as coal. Coal reserves are a rather definite amount. They have been drilled ahead, and there is still questions, there is room for error, but they are pretty definitely established.

On the other hand, with oil and gas reserves, the producers of these fluid fuels drill ahead only enough to keep them in business, and this is the figure that is generally reported. As I recall, there are proved oil reserves to last at the present rate of consumption about thirteen years, and there are proved natural gas reserves to last at the present rate of consumption about twenty-one years.

This is misleading, because this is a floating average. Each year the company develops so much more, but we have very little data on total reserves of oil and gas.

Q. Did I understand you to say — I didn't exactly understand your answer — that the reserves though of coal
2819 at the present rate of production and consumption is around seventeen hundred years? A. Yes.

Q. That is in the United States? A. In the United States, yes.

Mr. Combs: You may ask him.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Scollon, I would like to take up first this Table I on the sheets, Exhibit 146-A, and this shows does it not a

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competition in the generation of energy between these different fuels, and that in the country as a whole the coal has suffered in this competitive race? A. That is correct.

Q. On the other hand, in Table — or rather they skip back and forth.

— Let me ask this question. Do you have any information with respect to how this competitive race between fuels has resulted in Tennessee consumption? A. No, I do not have that on a state basis.

Q. And is it not true that coal has increased its position in Tennessee, rather than that position being declined? A. I can't answer that as a per cent of consumption. The only indication I have is in the production figure for the 2820 state of Tennessee.

Q. Well, with respect to consumption, however, would you have any figures? A. No, I haven't.

Q. Is it not true that the Tennessee Valley Authority steam plant system uses coal, or do you know? A. I understand it uses coal.

Q. Yes, sir. And it is equipped to burn coal? A. I understand it is, yes.

Q. Is it equipped to burn gas or oil? A. I do not know.

Q. And therefore, if — are you acquainted with the figures of increased consumption for steam utility use in the state of Tennessee? A. I am not.

Q. Accordingly, is it not true that this Table One, with respect to the country as a whole would not prove true necessarily with the state of Tennessee? A. It would not necessarily hold true for any State.

Q. Yes, sir. And it may be entirely true, might it not, that this race between fuels would have little or no bearing upon market conditions in some areas such as Tennessee as compared to other areas? A. As I mentioned earlier, when we were discussing exports, the decrease in the export market makes coal available farther inland, and this has a pyramiding effect in some cases, so that

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the situation could be different in each state, but about it could be — each state could be — each state could be affected more by such changes in competition. It is a state-by-state problem.

Q. And in order to have an effect in Tennessee, it would be because coal was brought into Tennessee from elsewhere? A. It could be, yes.

Q. And — now Table Two, let's take up Table Two. A. All right.

Q. I believe that is Exhibit 147-A.

Q. There we see that the third column of user, Electric Utilities, has increased in its position with respect to the use of coal. A. Yes.

Q. In the United States. A. Yes.

Q. Quite extensively. A. Yes.

2822 Q. Now, that is steam coal, is it not? A. Yes.

Q. And also the industrial use is largely steam coal? A. Yes.

Q. And those two together make up close to three-quarters of the use of coal in the United States in 1959 — 1958? A. That is correct.

Q. Now has that increased use of steam coal affected the average price of coal in the United States? A. The Bureau of Mines statistics would not reflect this. I would like to add that there is no price by class of coal as steam coal, and although coking coal used for coking purposes usually commands a higher price, that in many cases where there is an over-production of coking coal, it moves into the steam market also at a lower price.

Q. Yes, sir. But this increased use of steam coal has not meant that the price of coal has gone down to any appreciable extent as shown on Table B here? A. On Table B — that is correct, in the United States in Table B.

Q. In the United States? A. Right.

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Q. Table Three, let's consider Table Three.

2823 Table Three does show Tennessee's production increasing to 1956, that is in this period of 1950 to 1959?

A. Yes.

Q. That production did increase to 1956, and then rapidly fell, is that not true? A. Yes.

Q. Do you know why the production increased from 1950 to 1956? A. I do not.

Q. Would you be of the opinion that the increased use of steam coal by the TVA would have a bearing upon that? A. I don't believe I am prepared to answer that to give an opinion, sir.

Q. All right, sir. And you would have no knowledge of the continued use of steam coal in comparison to the 1957, '56, in the later years, 1957 through 1959? A. In Tennessee, no.

Q. Let's turn to Table Four.

Mr. Scollon, these figures in the first column, Class 1 Mine, do they not show a decline in the position of these big mines in the period of 1945 to 1949? A. Yes, they do.

2824 Q. And does that not show that some sort of crisis presented itself to these big mines in the period of 1949 to 1950? A. Not necessarily.

Q. Will you explain. A. Well, there are many factors that can affect production, and as I mentioned a moment ago these mines can move from one group into another or go out of business altogether, and the post-war recovery period was just over, the market was dropping, and it is possible that the general market conditions, the general competition, just reduced production from this group.

Q. In other words, the smaller mines were increasing in number and in percentage of production in that period of 1948 and '49? A. In 1958 and '49 the number, or total number of mines in the United States had increased to an early peak of 9,000 mines in 1958 and there were 8,600 mines in 1949.

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Mr. Kramer: The witness used the figure '1958'.

Mr. Rowntree: Yes.

The Witness: I beg your pardon. I did not hear the question.

Mr. Kramer: I thought we were talking about 1948 and 1949 and you used the figure 1958.

2825 Mr. Rowntree: I was talking about 1948 and 1949.

The Witness: Yes. I was giving the figure for 1958. If I said "1958" I was in error.

Mr. Kramer: That is what I thought.

The Witness: In 1948 there were 9,000 mines and in 1949 there were 8,500 — 8,600 mines.

By Mr. Rowntree:

Q. And this Table 4 I am looking at, does that not show that the participation, percentagewise, of the big mines was 41.5 in 1947 of the total production, it dropped to 38 per cent in 1948, and it dropped again to 29.3 per cent in 1949? A. That is correct.

Q. And, of course, that difference had to be made up in smaller classes of mines? A. Yes, sir.

Q. In other words, these big mines were losing business to the smaller mines in that period of 1948 and 1949? A. That is possible.

Q. And is it not true that this same table, Mr. Scollon, shows that immediately after that period, commencing in 1950, these big mines not only held on to what they had but started to increase their participation in the production of coal? A. That is correct.

Q. Does not that same chart show that 1950 was a year of change with respect to these big mines? A. I think it was 1949 when the low point was reached, 29.3.

Q. And 1950 was the year when the increase started? A. Yes.

Q. I would like to drop over to Table — let's see now — Table 7, which is Exhibit 152-A. I think, Mr. Scollon, we have had an exhibit on the board comparable to this but

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limited only to two years, the years 1955 and 1959, in previous testimony.

This does show that Tennessee does not have any big mines — I mean, Class 1 mines? A. That is correct.

Q. It shows that Class 2 has been holding on in the period 1950 to 1959, does it not? A. That is correct.

Q. I suppose that you have no knowledge as to what those five mines are? A. I have not.

Q. Does not this table show that Classes 3 and 4 have suffered with respect to retaining their position in 2827 the production in the period 1950 to 1959? A. That is on another chart — on the production, your question went to production?

Q. I am talking about number of mines, really. A. It shows for Class 3 mines there were 15 in 1950 and two in 1958. In Class 4 mines there were 16 in 1950 and 20 in 1958.

Q. Do you not think, Mr. Scollon, that the absence of big mines in Tennessee and the low number in 1959 of these classes, 2, 3 and 4, would largely be attributable to the working conditions in Tennessee, that, size of seams, terrain, and so forth? A. As I mentioned, the thickness of the coal seam has a great deal to do with the number of mechanized mines, and to that extent there could be an effect.

Q. Now, Mr. Scollon, look at the year, particularly 1953 there on that Table 7. Does not that show that Classes 2, 3 and 4 — well, Classes 3 and 4 particularly — had a big drop in that year? A. From the year before, yes.

Q. That is right. And in that same year do you not see that that Class 6, the small mines increased by almost 200? A. Yes, sir.

Q. Would you think that there is some connection 2828 between the great decrease in Class 3 and 4 and the great increase in Class 6? A. No, it would be very negligible. Look at the total column, the increase — I mean, if you pick up the mines that were lost in Classes 3 and 4,

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it could not begin to make up for the increase in the total here in the Class 6 mines or in the total.

Q. But Classes 3 and 4 would generally employ quite a number of men in comparison with Class 6? A. Per mine, yes.

Q. Yes. Now would it not be reasonable to say from these figures that when these Class 3 and 4 mines closed in 1953 that the men who worked in those mines then went over to Class 6 mines? A. It could. It would depend on many factors, geographical location, and so forth.

Q. Let's compare Tables 8 and 9, and I believe that you have already pointed out here that the underground mine in Tennessee has had a hard time with respect to mechanization? A. Well, the —

Q. Comparing the 1959 figure of 39 per cent on Table 9 in Tennessee with the 1959 figure of 10 per cent from Table 8 for the United States with respect to hand loading.
2829 A. Well, what the table says is that 39 per cent was hand loading underground in Tennessee in 1959 and 10 per cent was hand loading underground in the United States in 1959.

Q. That is the best evidence what the table shows, correct. And the mechanical loading figures show just the reverse, that is, that the United States figure is higher than the Tennessee quite a bit. A. That is correct. 59 per cent mechanically loaded in 1959 in the United States and 32 per cent mechanically underground in 1959 in Tennessee.

Q. Right.

Returning to Table C, which we will have to compare with Table B, I would like to file this little chart which I have taken from the figures on those two tables.

(Exhibit No. 165 was marked for identification and filed.)

2830 By Mr. Rowntree:

Q. There we see, do we not, that in 1949 the average price of coal in the United States was \$4.88? A. Yes.

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Q. And in Tennessee in that year the average price was \$5.29; that is correct? A. I have \$5.25 for 1949.

Mr. Rowntree: Let's change that figure.

2831 Q. So Tennessee starts off this period we are covering here, 1949 to 1958, considerably ahead of the United States average price? A. That is correct.

Q. And do not these two charts show that the Tennessee figure or average price dropped to \$4.60 in 1953 and then down to \$3.96 —

The Court: How much in '53?

By Mr. Rowntree:

Q. \$4.60 in 1953 as compared with \$4.92 for the country as a whole in that year? A. This is correct.

Q. And then the next year, the figure dropped in Tennessee to \$3.96, is that right? A. Yes, sir.

Q. And in the United States it dropped to \$4.52? R. Yes.

Mr. Combs: The year 1954.

By Mr. Rowntree:

Q. That is the year 1954. That was a pretty hard year on the coal industry generally, I take it? A. Apparently so.

Q. The figure in Tennessee has been gradually going down after it went up — well, strike that.

In 1955 the Tennessee figure went up to \$4.08 as
2832 compared to \$4.50 in the country as a whole and, in 1956 the Tennessee figure was \$4.02 as compared to \$4.82 in the country as a whole in 1956? A. That is correct.

Q. In other words, the national figure went up rather sharply and the Tennessee figure declined slightly? A. That is correct.

Q. Do you know whether or not the Tennessee production, or consumption of coal went up sharply in that period of time or are you acquainted with that? A. I do not know. I know the production went up, which usually parallels the consumption.

Q. And the national figure went up again in 1957 and the Tennessee figure went down again in 1957? A. Yes.

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Q. And the Tennessee figure declined again in 1958, corresponding to a decline in the national figure?

The Court: Are you talking about production or prices?

Mr. Rowntree: These are prices, your Honor.

The Court: Well, in order to keep the record clear, shouldn't you go over those prices in '57 and '58 like you have done in '55 and '56? The witness can't see the board and neither can the Court. Maybe some of these younger people can see the board.

2833 Mr. Rowntree: I am in your way, too.

1957, the price of Tennessee coal went down \$3.92.

The Court: All right.

Mr. Rowntree: And the price of coal in the country as a whole went up to \$5.08.

The Court: All right.

Mr. Rowntree: In 1958, the Tennessee price went down to \$3.83, and the price of the country as a whole dropped to \$4.86.

By Mr. Rowntree:

Q. Mr. Scollon, do you know why the Tennessee figure is lower in these years, 1954 through 1958, than in the preceding five year period, whereas the national prices were not appreciably lower in the later period? A. I do not.

Q. Now if a coal company, Phillips Brothers Coal Company, following the spot market of TVA, had an average price for its steam coal of \$3.92 in 1956 and an average price of \$3.20 in 1957 and an average price of \$3.13 in 1958, would you not say that this spot market of the TVA, which was followed by Phillips Brothers Coal Company, a market involving the consumption of approximately 5 million tons a year, was the cause for that decline in the Tennessee average price? A. A price representing 5 million tons

2834 would have a significant effect on the average, yes.

PATRICK B. C. SMITH

called as a witness by and on behalf of the cross-defendant,

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2835

DIRECT EXAMINATION

By Mr. Rayson:

Q. Will you state your name, please? A. Smith. The initials are P.B.C.

Q. Mr. Smith, where do you live? A. In Knoxville.

Q. And in what business are you engaged? A. In the coal selling. I am president of Inter-Mountain Coals, Incorporated.

2836 Q. Is Inter-Mountain Coals a coal sales agency?

A. Yes, altogether.

Q. It is not an operating company? A. No, it is not an operating company whatsoever.

Q. Are you the sales agent in this area for Consolidation Coal Company? A. For their properties that they have in this area, yes. Their Tennessee properties.

Q. I might ask at this point what properties Consolidation Coal Company has in this area? A. It is property out on the Tennessee Railroad and mostly in Anderson County. It was formerly known as the Moore Coal Company property here, and it was sold to Pocahontas Fuel Company in December 1953, and when Pocahontas Fuel merged into Consolidation Coal Company, why that is how it got there.

Q. When did that merger occur, do you recall? A. I couldn't tell you exactly. It is a matter of public record though.

Q. Mr. Smith, how long have you been in the coal business? A. Well, all my life. My father was in the coal business when I was born, and been associated with
2837 it; and I became actively engaged in it two years after I left college, and started to work for the old Southern Coal Company in Birmingham in 1932.

Q. And have you been in coal sales work since then? A. I say two years. About three or four years after I got out of college. That was in 1928. I take it back. Yes.

Q. Would you briefly review your work in the coal sales

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business since you joined Southern Coal Company in 1932? A. Well, I joined Southern in their Birmingham office as an order clerk in 1932, and along about 1934, why I became a salesman travelling North and South Carolina for them. And in 1935 we opened an office here in Knoxville and I travelled out of that office with headquarters — at least I lived in Charlotte for about a year and then in 1936, why I was brought back in here sort of as an office manager. There was some change in personnel within the company, and having been an order clerk once they put me back as an order clerk again, I guess.

And then from then on I was located here in Knoxville from June, 1936, first as office manager and then as district manager, and along through the years why I got to 2838 be a vice-president, and then about '46 I was moved to Memphis where the general offices were, and in 1937 moved my family over there and became — I mean '47, I beg your pardon, 1946, and in 1947 why I was made president of the Southern Coal Company and remained as such until, oh, about the latter part of 1951 and we moved our general offices from Memphis up to Chicago in 1949, and I moved back here in 1951 as — early '51 as a vice-president in charge of the so-called eastern division of Southern Coal Company which was headquartered here in Knoxville.

And then in June of 1951, why the Southern Coal Company was more concerned with the middle-western fields and I took over the eastern division and we formed Inter-Mountain Coals, Incorporated, with headquarters here in Knoxville and started the business on July 1, 1951.

Q. Is Inter-Mountain Coals an independent sales agency?

A. Absolutely. All of our stock is owned by active executives of the company.

Q. And in your experience that you have outlined for us have you sold coal to the TVA on the term market and on the spot market? A. Yes, sir. Ever since, oh, whenever they first — well, the old Wilson Dam steam plant in Alabama, before they dreamed of all these others. I guess ever since

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they have been buying coal I have sold them, yes.

2839 Q. Have you sold coal to the various other markets available to producers of coal in East Tennessee? A.

Oh, yes; yes.

Q. Mr. Smith, on the far bulletin board by the jury is a map of the TVA system, and I would like to ask you a few questions about the matters which appear on this map.

Q. Mr. Smith, we have been talking about a mine in Campbell County for several weeks, and I suppose that everyone here knows where Campbell County is, but I take it it is about due north of Knoxville up here near the Kentucky line; is that right? A. I would say that. I wear bifocal glasses and I can see that thing pretty well from 2840 here, but that is it.

Q. I will mark a "C" by Campbell County so we will all be familiar with that location.

Mr. Kramer: Mr. Rayson, what is the number of the exhibit you are dealing with so the record will show.

Mr. Rayson: The map is Exhibit No. 145.

By Mr. Rayson:

Q. Mr. Smith, what are the eastern division plants of the TVA? A. Oh, Kingston steam plant, John Sevier steam plant, the Watts Bar, which is more or less stand-by, and that is what we commonly refer to sometimes — sometimes they bring the Widow's Creek plant in. It is sort of a stand-by.

When we talk about the eastern division, why usually the John Sevier and Kingston really, although I believe when they do buy spot coal sometimes why they do include Widow's Creek in certain invitations.

2841 Q. Now are the Watts Bar, and Kingston, and John Sevier plants the steam plants of the TVA to which the coal from the area of Campbell County, which is sold to the TVA, is sold? A. Kingston, John Sevier and Watts Bar, that is correct. Of course, Watts Bar has been idle, off the line, since I believe '57.

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Q. Do you know if Watts Bar is one of the older steam plants of the TVA? A. Well, it was the first plant that they built themselves back in the 40's. It is there. Of the ones that they built themselves, it is the oldest. Of course, they have still got the old Wilson Dam steam plant.

Q. The Wilson Dam steam plant? A. Yes, and the Ocoee.

Q. That is this steam plant here in northern Alabama? A. They are all plants that were in existence before the TVA was and then they came in and they just took them over from other things.

Q. Now do you know, Mr. Smith, whether coals in the area of Campbell County have ever been sold to these steam plants in the western division of the TVA system? A. Not to my knowledge, no.

Q. Do you know why that would be? A. Well, 2842 they are just not competitive over there from the standpoint of transportation and all that.

Q. In other words, would you say that the rail rates from Campbell County to Gallatin and Johnsonville and Shawnee would not be competitive with the rail rates of the mines in western Kentucky to those plants? A. That is right. I mean there has never been —

.

Q. Are there any coal mines in the western part of Tennessee? A. No, sir, not in the western part of Tennessee.

Q. What are the western-most mines in Tennessee? A. I presume these mines down in southern Tennessee would be possibly the western-most or out on the Tennessee Central Railroad around Monterey on what we call The Plateau out there.

Q. The mines you are referring to near Chattanooga I believe are in Sequatchie County? A. That is right.

Q. About an inch or two to the west of Chattanooga as shown on this map? A. That is right, and then due north, up there around Monterey, almost due west from the King-

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ston steam plant, why there is a coal field out there
2843 and some mines there.

.

Q. And there is no coal west of that in Tennessee? A.
Not to my knowledge.

Q. So the mines here in western Kentucky would be the
closest mines to these plants in this area, in the area of
Johnsonville and Gallatin? A. I would say the closest,
yes.

Q. Now you spoke of the Watts Bar steam plant closing.
Do you know if the TVA has closed any of its other plants?
A. Oh, you mean of these newer plants that they built them-
selves?

Q. Of any of its plants. A. Oh Lord, they acquired a
plant in Nashville, you know, and I am sure it is closed.
They had one in Paducah. I am sure it is closed. Wilson
Dam, I am sure it is closed. They had one down here at
Ocoee, and I am sure it is closed. Had one up at Watauga,
and I am sure it is closed. But those are all plants, small
plants that they acquired and the TVA got cleared through
the Supreme Court.

Q. Mr. Smith, in order that it will appear on this map, I
will ask you if I am indicating the general area of the
2844 west Kentucky coal fields, the western Kentucky coal
fields (indicating)? A. Let me see. That is the
Shawnee plant. Yes, that is about it.

Q. Right in here (indicating)? A. In that general area,
yes. It is right there near the Kentucky dam, which is just
before — I think it is 20 miles before the Tennessee empties
into the Ohio, is a place known as Grand River, where there
is a facility for transferring rail coal to barge, and that is
approximately 60 miles roughly from the heart of the west
Kentucky coal field.

Mr. Rayson: Your Honor, I have written "West Ken-
tucky Field" on the map.

The Court: Yes, sir.

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By Mr. Rayson:

Q. Mr. Smith, are there more than — is West Kentucky Coal Company the only company operating in that field?

A. No, no, there are several there. Would you like me to name some of them?

Q. You might name some of them. A. Bell & Zoller Coal Company, Peabody Coal Company, United Electric Coal Company — let's see — Kirkpatrick Coal Company, Pittsburgh-Midway and several others. Those are the ones that come to mind.

Q. Were any of those mines in west Kentucky able
2845 to sell to the John Sevier, Kingston and Watts Bar plant when it was open? A. I beg your pardon?

Q. Were any of those mines in west Kentucky able to sell coal to the eastern division steam plants of the TVA? A. Watts Bar, before the others were built, and during the war years, when there was quite a demand for coal, some west Kentucky coal was sold under contract, that is coal from the western Kentucky field, to the Watts Bar steam plant and barged there. It was sold on a competitive basis. At that time the market was extremely good, so to speak, from the standpoint of realization here and most of our so-called eastern coals in this area apparently had more attractive places elsewhere to where they could put the coal, because it was a very high market. That was one time that western Kentucky coal moved to Watts Bar. That was before, long before the Kingston steam plant was even dreamed of.

Since the Kingston plant has been there, why back in 19— early 1956, there was some western Kentucky barged coal, I believe, — in fact, I am sure there was some barged to the Kingston steam plant, more or less coal that was moving to other plants. It was diverted to Kingston, just at the same time there was some coal from southern Tennessee that was diverted into Kingston.

Now that would be the fact there had been quite a
2846 drought, as I recall, and the latter part of '55 the hydro on the TVA system was not producing the

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power they wished. The weather wasn't too good, and a lot of this so-called, I call it, outdoor mining around here wasn't working too well and the TVA had a few, at least, long term contract suppliers that had failed to deliver, and Kingston plant got down to where — well, I believe it came out in the papers, down to about a week's supply of coal down there. It was an emergency condition existing, and there was some western Kentucky coal brought in during that period, but it was hardly a competitive situation.

Q. Before we go into that situation any further, let me ask you if you will compare the cost of transporting coal by barge to the cost of transporting coal by rail? A. Well, the TVA in evaluating a bid has a rule of thumb which seems to be, stand up in actual practice. They will evaluate transportation charges by barge at two mills per ton mile, plus 25 cents per ton. I think they have some barge contracts that may even be lower rates than that, but that is their standard for evaluating a bid, unless you have a specific barge contract.

Rail, why I would say that a rail rate runs on the average better than a cent per ton mile. For example, the Southern Railroad rate to Kingston is \$1.10 and the mileage from our mine to Kingston is — do you mind if I refer to a 2847 figure to make sure?

Q. Not at all. A. I have got some notes here. Our approximate mileage to — from the Moore mine to Kingston is about 90 miles, the rate is \$1.10.

2848 There may be some lower than that. Why I understand — in fact I know — that the L&N Railroad has published some recent rates that probably run less than a cent a ton mile.

Q. In any event, there is a very substantial advantage to the shipper who ships coal by barge coal? A. Oh, very much so, yes.

Q. In preference to rail coal? A. Oh, yes. Yes.

Q. Now, I want to go back to the 1956 situation involving

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the Kingston Steam Plant, and ask you if you can explain or give your understanding of how the Kingston Steam Plant was caught short of coal during that year. A. Well, now, I don't work for the TVA, but I mean I have my personal opinion, I think it is correct. They made no attempt to hide it so far as I know.

As I said a minute ago, why, during the late '55, there, as I recall, and early part of '56, why drought conditions were such that the hydro didn't produce the power that it normally would.

TVA had some long-term volume coal contracts for the Kingston Steam Plant on which, for one reason or another, the supplier was, or suppliers were rather, substantially behind in deliveries, and the general weather conditions there in late '55 and early '56 interfered with the operation particularly of at that time strip mines which were outdoors, and they had a lot of difficulty.

Q. How does the weather interfere with the operation of strip mines? A. Well, in this area, strip mining is practically altogether contour, which means it is up on the side of a mountain, and the coal seam drifts in at whatever elevation it is, and they have got to first get up there.

For example, if we were stripping at our — to be specific — at our Moreco, why the elevation of the seam there is about twenty-three or four hundred, I believe, and we would have to get up the mountain there and start where the coal crops. The drifts, the seam drifts out to the side of the mountain, and get a shovel up there and start stripping what we call the overburden, and just picking it up in open pits so to speak.

Q. And then one — A. And there it is, and then you have got to get it down to the railhead or wherever you are going, and then it is quite a problem of road transportation, particularly in rainy weather.

Q. Were there any other factors then that created or added to the TVA's situation in Kingston? A. Well, yes.

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Yes, there were several. For example, in July of '55, why we were successful in negotiating with a private utility company, and the railroads, for a substantial freight reduction at another — at this private utility plant, and we made a contract to furnish around three hundred thousand tons a year with this utility.

Of course, our coal is right in what you might call the Kingston Steam plant basin. We weren't running the mine, but we — but when we made that contract, we reopened it, and there was three hundred thousand tons of coal a year that originally, I guess, the TVA would have expected to have been available to them that was moved to this other utility, and ours was not the only contract. There were others made, and that particular utility bought a fair amount of coal, so to speak from the Kingston Steam Plant's bread basket.

And then, on top of that, the export market, which became rather attractive about that time, and I guess there were just a lot of people that thought they could do better in other markets, and it got the TVA to — well, their sources were rather rigidly restricted, because of other markets available to those sources.

Q. Now, what happened as a result of this situation? A. Well, they, I believe they had a bid opening there, a term bid opening along about February of '56, I believe. I'm not quite sure, but somewhere along in there, and the coal offered to them was not sufficient, I guess, for their needs, or they thought not, and they bought rather heavily on the spot market.

As I mentioned before, they diverted some western Kentucky coal that was already under contract to the plant to help out. They diverted some southern Tennessee coal that was already under term contract to the plant to help out.

They bought all of the spot coal that was offered to them at — oh, up to their valuation of say 23½ cents a million.

They encouraged — for example, they came to us and —

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to encourage new development, and we opened a new operation more or less on an experimental stage or basis —

Q. What operation did you open? A. Well, what was known as the old Trimore property. It had been closed since — well, we closed it in June, '54.

Q. Did you negotiate a contract with the TVA at this time? A. Well, they negotiated one with me. Mr. Claytor came to Knoxville and asked — they were trying to encourage great development and all of that, and they negotiated one with us. They negotiated, I'd say, at least a half dozen, maybe a dozen.

It was — the one they gave us was based on fifty
2852 thousand tons or six months, whichever we got to first, and I think the others that they negotiated were about the same basis, and it did encourage considerable new development, I am sure, in the general area.

2853 Q. At what level did the Kingston inventory pool get to in 1956? A. It stayed below 30 days there for quite some time. I think there was a newspaper report that it got down to less than a week's supply. Whether it actually did that or not, I can't say.

Q. What is the normal inventory that TVA carries for its plants? A. When they built their storage yard it was designed to hold a million and two hundred thousand tons. Their annual burn, the maximum I would say, probably be about four million eight hundred thousand — maybe that could egg up to five million.

The usual rule of thumb, nationally, for utilities, is anywhere from 60 to 120 days, or even as much as 180 days. It all depends on where the utility happens to be located. And the TVA's first idea, as I recall, was maintain a 90-day supply.

Now that may vary, down to 60 instead of 90. I just wouldn't know.

Q. Now Mr. Smith, going to another subject, have you prepared a chart showing the annual consumption of coal

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in tons by the TVA for the TVA fiscal years ending 1956 through 1959? A. Yes.

2854 (Exhibit No. 166 was marked for identification.)

Q. From what source did you obtain the information shown on this chart, Mr. Smith? A. Oh, from a book that the National Coal Association gets out annually that is based on Federal Power Commission records. I mean, the actual source is Federal Power Commission records which are a matter of public record.

All utilities report their burn to the Federal Power Commission. I believe the TVA issues an annual fiscal year report and the same figures, I am sure, are in those.

2855 Q. Now would you explain what this chart shows, Mr. Smith? A. Well, it shows the burn of each plant, each steam plant of the Tennessee Valley Authority system on the fiscal year basis ending with June 30 of those respective years.

The burn, you can call that consumption — I mean it is the actual coal that went through the plant and was converted to electricity or ash or all the rest of it.

Q. In other words, this was the coal that the TVA used at these various plants in generating electricity; is that right?

A. That is right, the individual plants.

Q. Not what they bought but what they used. A. What they actually burned.

Q. Incidentally, I believe the TVA fiscal year ends on June 30? A. That is right.

Q. So the 1956 year would cover the period from June 30, 1955 through June 30, 1956; is that correct? A. That is right.

Q. And so on for the other years. A. That is correct.

Q. I believe that this exhibit shows the consumption of coal regardless of whether it is term coal or spot

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coal? A. Oh, yes. It is just the burn. It doesn't matter how it got there. It is coal that was burned in the plant.

Mr. Rayson: Your Honor, if I may, I would like to read some of these figures to the jury and state our position with respect to them.

The Court: You may.

Mr. Rayson: I refer first to the figures pertaining to the Kingston plant in the third column from the righthand side of the chart.

You will note that in fiscal 1956, 4,290,000 tons of coal was burned. And 1957, 4,699,000 tons of coal was burned. 1958, 4,326,000; 1959, 4,334,000.

Then the Johnsonville and Colbert plants, you will note that the amount of coal burned, the total amount of coal burned in 1956, fiscal 1956 exceeded the amounts of coal burned in 1957 at each plant, and that the 1957 figures exceed the amount of coal burned in 1958.

In other words there was a declining picture at those two plants.

2857 You will note that at Shawnee the amount of coal consumed in 1956 was 4,481,000 tons; 1957, 4,793,000 tons; 1958, 4,849,000 tons.

By Mr. Rayson:

Q. Mr. Smith, I will ask you in connection with Shawnee if an enlargement was made to that steam plant at any time during that period? A. Shawnee steam plant; the last and 10th unit — it was a 10-unit plant built between — well, the first one came on the line in April 1953, and the last unit came on the line in October 1956.

Now the intervening, or the number 2, 3, 4, 5, 6, 7, 8, 9 came on at pretty regular intervals during that period.

Q. Let me ask you this, Mr. Smith, in the fiscal year 1957, in the early part of the fiscal year 1957, was increased equipment put into effect at Shawnee? A. Oh, yes.

Q. And that equipment if used would require a consumption of additional coal? A. Well, each unit wts, I believe, 135,000 KW, and a rule of thumb is about two or three —

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about three tons of annual consumption per KW, so I would say the three tons, just one unit alone, would account for at least 300,000 tons in that fiscal year.

2858 Mr. Rayson: Of course, your Honor, we have introduced this exhibit in connection with the theory that by reason of the integrated operations of the TVA less coal would be consumed in the east if more coal was consumed in the west, and vice versa.

And we would point out, of course, that the only evidence on that is the statement this was a theoretical possibility on the part of Elmer Hill of the TVA.

Your Honor, we want to introduce this Exhibit 166 if we have not already done so.

The Court: All right.

(Exhibit No. 166 was filed.)

By Mr. Rayson:

Q. Mr. Smith, would you explain to us why coal companies would want to engage at certain times on the spot market, what factors might contribute to a coal company's desire to enter upon the TVA spot market? A. Well, there are great many different factors that might influence you to do it. For example, you may have in mind opening a new property. You drill it as best you can to try to find out as much as you can about it but you are not positive of the exact quality of the property you are going to be able to deliver. The only way to find out about your mining conditions actually is to get in there and mine.

2859 The spot market of the TVA offers an opportunity to really get in there and experiment temporarily and convince yourself whether you have a good property or not; whether it is an acceptable product. You can find out in a relatively short time. If you have not, why all you have done is spent the money to run the thing for a few months and you have learned that it is a lemon, and if it proves up satisfactory why then you got a basis for your long-range planning of your property and all that.

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In other words, the spot market is not anything you would use for a permanent outlet for your coal. It is a temporary proposition.

Another thing, several mines screen out various sizes and perhaps they have a ready market for, say, 85 per cent of the various sizes production-wise that they produce.

Q. What are these screened out coals called? A. Well, it all depends. Some mines screen out what we call block and egg and nut, stoker nut, and carbon, which is a fine dust, from a quarter-inch down, or an eighth-inch down. It is the by-product of making double-screened stoker coal.

And some mines crush everything down and make just a stoker coal and carbon, but in order to make stoker 2860 coal, why they have got to make carbon because your stoker coal and domestic stoker, and even other stoker, is what we call double screened. It has a top size and has a bottom size, so the minus of that bottom size is the by-product of the operation of making stoker coal which is commonly called carbon.

As I say, if your mine is running along and maybe 85 or 90 per cent, maybe 95 per cent, of your coal is sold and this sort of by-product of the coal operation is hanging over your head, why the spot market offers the TVA, or any other spot market, offers an excellent opportunity to balance out your run, because most mines have no place to store that stuff or no reason to at the mines.

Q. Can you store coal indefinitely? A. Yes, you can store it indefinitely. But then you can't store it in railroad cars because pretty soon you have exceeded your car rate, or no bill rule as they call it, and you don't get any more cars.

A coal mine, in any given month, that has 85 per cent of its production sold on a satisfactory basis and has 15 per cent say, or 5 per cent, or 10 per cent, hanging over unsold, is happy to dump that on a spot market in order to balance out the operation and continue running.

Another thing, sometimes you have your coal sold under

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contract or otherwise, anyway, satisfactorily sold.
2861 something happens at the plant of your customer.

Maybe a breakdown or something that he can't take the coal. As of today why you got it sold and maybe you think for a year ahead of time, certainly for a long period, and tomorrow he calls up and says such and such unit broke down, or something like that, and stop his shipments.

2862 And usually it is a temporary thing. It sometimes pays to take those shipments that you thought you already had sold, but you suddenly find out they are not sold and dump them on the spot market to maintain the continuity of your operation. Particularly, if it is an interruption, that your customer is of a temporary nature, which you usually find out. There are times when you have trouble on the railroad and there may be some embargoes in certain directions where your coal happens to move. Maybe it is sold in that direction and there is a flood or something and you can't ship it in that direction, even though it is sold. Rather than shut down, temporarily you might divert that coal to some spot market, either TVA or Duke Power, or wherever you can.

Q. Now, Mr. Smith, I take it that where it is possible to secure a term contract, that it is more preferable for a coal company to operate under a term contract than it is under a spot contract? A. Oh, I just — you asked my personal opinion and it is the practice of our company, by that I mean Inter-Mountain. We couldn't live — I don't see how anybody could live on a spot market for any length of time. The nature of a spot market is temporary. You can do anything on a temporary basis, but you can sure go broke in a hurry if you stretch it out very far.

2863 Q. What are the advantages of a term contract to the coal operator? A. Well, under a term contract, you know where you are going. You know how much coal you have sold. You know when it is going to move. You can plan ahead. You can invest money in facilities to improve your operation and get greater productivity. Well,

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if you know where you are going for a long period ahead of time, why you can plan accordingly. You can work out your property.

Q. With respect to the TVA market, what has been the comparison in price, on a normal basis — on an average basis, what has been the comparison in the price that the TVA has paid for term coal as compared to spot coal? A. Oh, on their evaluation theory, oh, I would say it runs maybe a cent and a half or two cents a million less.

Q. Less for which? A. Less for spot than for term coal. Now there have been times when that has varied more than that. There have been times back in '56, they paid the same thing for spot coal that they are willing to pay for term rate. That is typical emergency, and they were buying a good bit of that spot coal on account of suppliers who had fallen down on deliveries of term contracts.

Q. Would you explain why in the normal periods of 2864 time the term market commands a greater price than the spot market for coal? Well, the term market is that keeps you in business. You sort of figure what you can do with your property, what it is going to cost you to mine coal and what you are going to have to get for that coal to regain your investment and return a reasonable profit and, naturally, when you sign your name to that term contract, you are obligating yourself for a definite tonnage for a definite period of years and you pretty well want to know that you are getting a price that will return you your investment, plus a reasonable profit.

Q. In other words, you have a greater responsibility, the coal operators, a greater responsibility on the term bid, is that right? A. Oh, yes, absolutely. I mean you are committing yourself for a period of years, you as an operator, or a period of months, usually a period of years.

Q. What is the commitment on a term contract — I mean a spot contract? A. A spot contract, under the TVA is 30 days. I mean you can take all sorts of chances on a 30-day basis, but you can't on a 30 year or even a one year basis.

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Q. Now there has been introduced as an exhibit in this case Exhibit No. 104, listing a number of term contracts with the TVA, and I would like to hand the witness this exhibit, if I can find it.

Your Honor, this exhibit covers a number of different companies, not just the Consolidation or Inter-Mountain.

I would ask the witness if he would explain in general the contracts shown on this exhibit with which he was concerned. A. I beg your pardon. You are asking me —

Q. For example, does the contract shown under date of December 7, 1956, some eight or ten lines from the top of the page, for Inter-Mountain Coals, was that your contract?

A. Yes. It appears there are two contracts, each for 5,000 tons per week. That was really one contract. We named two mines under which we obligated ourselves and obligated ourselves to a minimum of 5,000 tons weekly, but not more. We reserved the privilege of shipping from either mine, and the reason for putting it in that way was the quality of the two coals was different, and we had a different guaranteed analysis, but it was only a 5,000 ton a week contract.

Q. Whose mines were these? A. At that time they were, I believe, the mines of the Pocahontas Fuel Company. I believe that was before Pocahontas went into Consolidation Coal Company.

Q. This exhibit shows the date of this contract or these contracts, their term in months, the amount per week to be supplied on the contract, the cost per million BTU's, and it also shows the average spot cost on the TVA market at that time. I will ask you how you came to bid on these contracts and how you arrived at the price at which you submitted this bid? A. Well, let's see. This was '56. We had opened up the Trimore mine in the spring of '56 on this experimental contract for 50,000 for six months. We had completed that. We had the mine in operation. We wanted to continue in operation at this particular time — that was in '56 — let's see now.

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Yes. We were shipping about 25,000 tons a month, roughly, under a term contract to Georgia Power. And we wanted to keep this Trimore thing going and increase our production, so we put in this price, I mean this bid, and how we came about reaching the price, we figured that we needed the business and the producer figured the lowest possible price that he could afford to bid and still run a profitable operation. It developed in this particular instance that we were successful in an award — just as in many others that we had developed we were unsuccessful in using the same sort of figure.

2867 Q. Now I notice here on line 40 of this exhibit, under date of September 17, 1959, another sale for Inter-Mountain Coals is shown to the Kingston plant for a five year period for 5,000 tons a week at a price of roughly 22½ cents per million BTU's. Now from whose property was this coal to be shipped? A. That is from the Moreco mine of Consolidation Coal Company.

Q. Consolidation Coal Company had acquired this property in the meantime? A. Back there when I referred to the Trimore mine, it is the same thing. We call it Moreco.

Q. Well, these contracts that you show for December 1956, do you recall whether or not Consolidation Coal Company owned the property at that time? A. It is my recollection that Pocahontas Fuel owned it at that time.

Q. Was Pocahontas a subsidiary of Consolidation then? A. I don't believe so. I ought to know something about that.

Q. In any event, Consolidation owned the property in September of 1959? Consolidation. A. Yes, sure.

2868 Q. Now would you explain how you came to bid on that particular contract? A. Well, there were a lot of reasons on this. In the meantime— let's see — starting in, I believe January 1, '59, we had negotiated a ten year contract with another utility, with more or less stepped up tonnages through the years, which was satisfactory so far as we were concerned for the immediate de-

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velopment of this particular property. We happened to be served by a short line railroad, known as the Tennessee Railroad, and during 1959 why there was considerable concern as to the continuation of that railroad's operation. In fact, they petitioned for abandonment permission.

Q. This is the railroad that serves these mines of Consolidation? A. Yes, sir, that is the only way we can get it out of there.

Q. In Anderson County. A. It is a short line railroad that runs — the terminus is just a mile or two beyond us, I believe at what they call Fork Mountain, Tennessee. And it runs up, oh, roughly 40 miles up to Oneida, Tennessee, where it connects with the CNO&TP or the Southern, but it is our only way of getting coal out of there. The trouble that the railroad was having was lack of revenue tonnage. We were well satisfied with the tonnage we were producing at our mine and had sold under a long term contract. But it wasn't enough, and at that time we were about the 2869 only property out there that was showing continuity of operation. In other words, the Tennessee Railroad knew they could get so many tons a day from us five days a week. These mines run all the time. Weather has no effect on them or anything else. But the Tennessee needed additional tonnage over and above what we were shipping under our existing contract to this private utility. So we went to that utility and attempted to determine from them if they were in position to increase their rate of shipment.

Q. What utility is that you are talking about? A. Georgia Power Company.

2870 Q. All right, go ahead. A. And they were not in position to increase the rate of shipment. They were equally concerned with the continuity of continued life of this railroad, because they were naturally interested in this basin of coal that we had to support this ten-year contract that we made with them. So we tried to find some other

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way to increase the revenue freight available to the Tennessee Railroad.

So, the only way at the time seemed to be to bid on the TVA which we did, and we had been bidding off and on to the TVA, but with the thought in mind of trying to get some business, which really was additional business for this railroad.

Why, we put in that bid, and I believe we bid four dollars and five cents for the coal for a five-year basis, five thousand tons a week, and then — you want me to go on as to how we got the award and all of that?

Q. I don't think that is necessary. Let me ask you this, though. Was the continued operation of that railroad of rather vital importance to your property? A. Oh, of all importance. It was a question of — see, that is a right valuable basin of coal we have out there, and here we were obligated to Georgia Power on a ten-year basis, and figuring with them for other things and other people, and we just couldn't afford to lose the railroad.

2871 Q. Well, now — A. It was all important, and I think the TVA was concerned about it too, because it is a basin of long-term coal out there available to the TVA.

Q. In other words, it serves many mines other than yours? A. Oh, yes, there's several other mines out there.

Q. And, Mr. Smith, — A. And there's a lot of coal under the ground.

Q. What? A. And there's a lot of coal under the ground.

Q. Yes. A. That will be needed some day.

Q. Now, Mr. Smith, in connection with this contract that you negotiated, 1959, and all the other contracts that you made with the TVA, regardless of market and regardless of the person you were representing in such transaction, did you have any intention of bidding coal so as to damage or run out of business small operators in East Tennessee? A. No, sir, there was no reason for that at all. I think you

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will find that the awards we have been awarded, and the awards that we have not been — I mean the bids upon which we have not received an award were awful high to show any indication of trying to run anybody out, because
2872 — I mean our bids are always based on what the operating department figured it cost them to mine a ton of coal and to recover their investment, plus a reasonable profit, and then —

Q. You did — A. We are happy to have competition. We just wish they would bid a little higher.

Q. Did you enter into any agreement with other companies? A. No, sir.

Q. To bid at a particular price? A. No.

Q. To TVA? A. No.

Q. Were you doing anything pursuant to any request or suggestion by the United Mine Workers? A. No, Lord, no.

Q. Did you have the final authority on the bids that were submitted to the TVA on behalf of Consolidation Coal? A. In effect. I mean, it had to have their final approval, but in every instance, why they have just gone right along with whatever I recommended.

Q. All right, Mr. Smith, I want to turn to another subject. Now — A. And incidentally, in all of these
2873 contracts, we appear as the prime contractor, Consolidation Coal Company. Prior to that Pocahontas Fuel Company is named as the producer supplying the coal. But we are the prime contractor. The bonds that have to be made that the TVA requires, performance bonds, and all of that are made in the name of Intermountain Coal.

Q. What sort of bond did you have to put up on that five-year contract, what amount of bond? A. Oh, Lord, what is it? Twenty — fifty cents a ton, I believe it is, on the first year's contract tonnage, and you have to — the bond is good for a year, and six months before the year expires, you have to renew it so it is always one year ahead.

Q. Do you recall what — A. In fact, I am renewing one this week.

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Q. Do you recall what the full amount of the penalty of that bond would be? A. I believe it is fifty cents a ton. I'd rather look at the contract.

Q. Would that be roughly \$130,000? Would that be about right? A. Yeah, I guess that's about right.

Q. Do you put up a private surety bond in a case like that? A. No, just do it through John Bailey. I've
2874 forgotten the name of the bonding company now.

Q. Do you know what it cost you to put up a bond of that size? A. Oh I think in the neighborhood of six, seven hundred dollars, something like that. I would have to look at my books to tell you exactly, but that is about my recollection.

Q. Are there any bonds required with respect to spot contracts? A. No.

Q. Now, Mr. Smith, I want to turn to another subject, and I would ask you if you would look at the chart which has been introduced before as Exhibit Number 147. —

Q. Mr. Smith, this chart has been introduced to show the various markets available for coal during the years 1940 through 1958.

2875 Q. If you will stand over here, please, sir. Now, looking at the period 1950, say, through 1958, I will ask you if the average national market which this chart undertakes to show, corresponds to the market existing during those years in the state of Tennessee?

Q. Are you able to say that the market which this photograph shows corresponds to the market which existed in the state of Tennessee?

In other words, did Tennessee in 1958 have roughly twenty-five per cent of its coal market for industrial coal, and so on, through coke, utility, retail, railroad? Could
2876 you explain whether the market in the state of Tennessee during that period corresponded to the aver-

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age national market? A. No, I wouldn't think it corresponded to the average national market, because, for example, here is metallurgical coal, coke producers, goes into making coke, and I'd say Tennessee production during that period that went into coke making was practically nil. There was some small amount, but certainly not of the importance that it is on this national scale.

Q. What about the market in Tennessee for industrial coal during this period? A. I'd say it was possibly typical.

Q. All right, sir. And what about the market in Tennessee for utility coal, for steam coal? A. Well, I'd say that the utility graph there would spread out quite a bit on account — particularly in the later years on account of the big TVA burning.

Q. And would the market shown on this chart for retail be typical of that in Tennessee? A. Well, of the coal mined in Tennessee, a fairly representative portion of it has always moved to what we call domestic use.

Q. Is there any railroad market left in Tennessee? A. Are you talking about now or in 1950?

2877 Q. Well, take — A. As a matter of fact, on the charts that the Bureau of Mines now sends out, why just this month I believe they left off railroad fuel consumption as of no importance whatsoever.

Q. I want to ask you some questions, Mr. Smith, about the prices of coal on an average. First of all, I will ask you what coal, or what market rather, normally brings the lowest price for coal? A. Oh, the utility market.

Q. Now is that — is this generally true? A. Yes, pretty much so. They can burn most anything, some of them.

Q. Now are there differences in utilities? Do all utilities burn the same grade of coal? A. No. No, they have different specifications. For example, utilities located near mines and what not, such as the TVA, or with low transportation charges and with very modern and up-to-date

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burning equipment, can burn most anything, and without added transportation charges, why it doesn't matter too much about the ash.

2878 Whereas, a utility, for example, in New England, where the freight transportation, or rather transportation charges, New England Utilities, most of the coal that they burn goes to Hampton Roads by rail and up the coast by boat, and my recollection is the rate to Hampton Roads goes, oh, at least three dollars and fifty or sixty cents a ton, and then you have got your transfer charge and boat transportation on top of that, so there is a lot of transportation involved.

For example, take New England Utility, when the coal gets there, and they would require a much higher, considerably higher quality coal. It's just the economics of the thing, and some —

Q. Is it accurate to say that while utility coals in general command the lowest price that there are different levels of prices according to the differences — A. Yes.

Q. — In utilities. A. Oh, yes, there are several utilities, for example, that won't burn coal over ten per cent ash.

Q. How much ash will TVA burn? A. Up to I believe it is sixteen per cent, and of course can burn above that and have by special adjustments and what not in price to compensate.

Q. Well, does the TVA then consume the most
2879 impure coals in comparison with other utilities? A. Well, yes. Yes.

Q. Are there any other utilities that compare with the TVA in this respect? A. Not as a system, no. I mean there may be some individual generating plant in one particular utility that is right at a mine mouth, and where the coal is just scooped up and thrown in the plant that might burn about the same as TVA, but by and large, as a system, why they have the widest specifications of any of them that I know.

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2880 Q. What, on the average, would you say is the difference in the price — and I am speaking of f.o.b. mine price incidentally — what would the difference in a mine price for coal suitable for domestic purposes be as compared to coal sold to utilities?

In other words, the block and the egg that is separated from the other coal. How much more would that bring than utility coal? A. Well, you have got various qualities of domestic coal for example, but the best domestic coal from this producing district, District 8, why block sells up around eight or nine dollars a ton f.o.b. mine. And some of it sells down maybe as low as six, depending on the market. It is a seasonable market, and all that, and depending on the quality.

And your egg would sell from fifty cents to a dollar under the block, and your domestic stoker coal would be — depending on the quality of it. If it is purely domestic and all, that is what we call a premium domestic stoker coal, it would sell at the mine for around between six and seven dollars. Some of it a little higher than that.

Your acceptable commercial stoker coal is down in the five-dollar bracket, or something like that.

Q. In any event, there is about a two or three-dollar difference per ton f.o.b. mine in those grades of coal as compared to the utility coal? A. Yes.

Q. What about then a comparison of coal suitable for coke purposes, ccke production, as compared to coal suitable for utility use? A. Well, that is a premium use. There isn't so much coal available. That is what we call of a metallurgical acceptance or grade.

Q. Will you explain what metallurgical coal is. A. Well, it is coal that goes into the ovens to be converted to coke for use in the manufacture of steel.

Q. What qualities must that coal have? A. Well, the number one importance is very, very low sulphur. I don't

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know of any order that will permit you to ship above .5 or .6 sulphur. And the next thing is low ash. They usually require a maximum of certainly not over 5 or 5½ per cent ash.

And then something about the phos in the ash. My education is always on this classic and when you get into the chemical stuff it gets too much for me — but there is something to the phosphorus in the ash that is important. And the ash itself is important. Because this coal, of course it is coked and in coking it the volatile gases are all driven off and about all you have left is carbon and ash. So you start out with a 5 per cent ash coal and convert it to coke 2882 and you come up with probably a 10 or 11 per cent ash coke.

Another thing too, the coking quality of the coal. The way it does coke, the structure of the coke it makes, and all that.

We have what is known as a British swinging index that is a measure of that. And, for example, many of the coals around here are low coke button, and there are three or four, even if they are low sulphur, low ash, low phos, and low everything else, that they are low coke button, they still don't go into metallurgical market because they just don't make satisfactory coke either from the standpoint of structure or something like that.

Usually you would want about a coke button of around 8 per cent, a satisfactory coke making coal.

And another thing in making coke, frequently, and almost as-a rule I would say, various types of coals are blended or frequently blended.

In other words, what we call a low volatile coal may be blended with a high volatile coal. Our coals down here are all high volatile and in southern West Virginia it is what we call — there is some what we call low volatile coal, and frequently they will blend it in the coke oven with a low volatile coal or medium or high volatile to come up with a

good coke that gives you good structure and all that.
2883 Lots of coals that perhaps satisfy each specification of sulphur, specification for coke button, the specification for some reason or other just don't blend where they have to go more on blend. And it all adds up to where you narrow down the available source of supply and naturally a metallurgical type coal demands a premium price.

Q. What price do you mean by "premium price" in comparison to utility coal? A. Oh, two or three dollars a ton higher, anyway.

Q. Is much of this metallurgical coal produced by commercial coal operators as opposed to captive coal operators? A. Yes. I think — yes, quite a bit of it is, but about — I believe the captive production of metallurgical coals — that is a matter of national record — must be around 20- or 25-million tons a year. The rest is commercial.

Q. What about the non-captive market of metallurgical coal, how much would it amount to? A. What about the difference there is between that 20- or 25-million and the national market for metallurgical coal?

Q. Do you know what the national market is for metallurgical coal? A. Normally, it ought to be around
2884 80- or 90-million tons a year. I can tell you what it has been for the first three months of this year.

Q. All right. A. Consumption — I got a figure here yesterday, I think. January 1 through the end of March, why there was 14,862,000 burned in the oven coke plants. For the same period of last year it was better than 25-million.

Normally, in a good year — it depends on steel production of course — a good year it can amount to as much as a hundred million tons, and this year it might run 60 or 60, I don't know.

Q. I want to go to the coals that are classified on this exhibit as industrial coals. How do those coals compare to utility coals? A. Well, normally, of course, there is a lot of coal that goes in the general industrial coal that also

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goes to utilities, but there is a lot of coal that goes to utilities that would not go into the general industrial market.

The general industrial market includes small industrial plants, factories and all sorts of things like that. It includes some of the chemical industry that has certain specifications. It includes the cement industry, and all, and, of course, industrial customers depend on—or their individual size plant determines the class coal they can use.

If you got a small plant the coal specification, the quality is much more rigid than a large plant.

Q. And what about a comparison of price f.o.b. mine of coals which would move to the industrial market as compared to coals which would move to the utility market? A. In the industrial market there is quite a tonnage of double screened coal. The same thing as stoker, an inch and a quarter by a quarter, that moves to the industrial market, which, of course, would go at a considerable higher price than would carbon or something like that.

There is a lot of industrial plants that can't use carbon. Usually it is the larger plant that can use carbon, which is our fine dust. A lot of industrial plants depend on their size for real coal burning.

For example, a plant that burns a couple of cars a week, their coal costs are not nearly as important to them in their final product or the final operation of the company as one that burns maybe ten cars a week, and so their plant and equipment, the burn equipment, might not be quite as broad in that it can burn almost anything the way a utility or the way even a big industrial plant can do.

So I would say that there are all sorts of good reasons why the general industrial market would be somewhat above the utility market.

Q. Now Mr. Smith, would you know whether on an average strip mined coal would bring as much f.o.b. the mine as underground coal? A. I would say that strip mined coal would bring less than underground.

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Q. Would you explain why that is. A. Well, there are several reasons for that. In some areas strip mining is just done for perhaps a particular utility situation that can use that type of coal, and were it not for a utility outlet for that type of coal that particular strip mine, or some of the strip mines, probably would not be open and so that is the only market it has.

And then, too, why particularly in this general area, very little, if any, effort is made to improve the quality of what strip coal is mined.

Q.. What do you mean by improve the quality? How do you go about doing that? A. When you take the stuff out of the mine, or out of the strip pit or mine, you just take what you got and include the grass, tree roots, mud and rocks and slate and coal and several other things. To improve your final product, why you can screen that coal out and pass it over a picking table and pick by hand and get the leaves out, or you can have mechanical washers and do it all mechanically, and the net result is a net product 2887 that you bring forth, particularly where it is mechanically washed, which is a much higher grade product and not just the low grade mine run that you ship right from the pit.

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2888 Mr. Rayson: Mr. Smith, I believe that we were talking just before recess about the difference on the average in the price of coal produced by strip mining as opposed to coal produced by other methods.

Now, your Honor, I would like at this point to call the attention of the Court and jury to Exhibit No. 116 filed in connection with the testimony of the witness John Amos. That witness referred to this booklet at page 9 and stated that for 1957 the national average price of coal was \$5.08 a ton and that for 1958 the national average price of coal was \$4.86 a ton.

On page 89 of this booklet, which is a Bureau of Mines

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publication, there is a breakdown showing the national average prices, state by state, and total, for the different kinds of mining.

Now this again shows that the national average for all types of mining is \$5.08 for the year 1957 and \$4.86 for the year 1958. But with respect to strip mining, for 1957, instead of showing a national average of \$5.08, the Bureau of Mines Publication shows a national average of \$3.89.

For 1958, instead of showing a national average of \$4.86, it shows a national average for strip mining of \$3.80.

May I introduce this particular page as the next exhibit. (Exhibit No. 167 was marked for identification and filed.)

Mr. Rayson: That is page 89 of Exhibit 116, entitled "Coal—Bituminous and Lignite", on which are shown the figures for two years, 1957 and 1958.

In order for our position to be clear, we would state that we contend that the national average price may be considered only if it appears that the market price in Tennessee has a relevance to the national market. In other words, that it compares to the national market. We would say that the national average price may not be considered unless the Tennessee market compares to the national market. However, if the national average price has any relevance, it is our position that the national average price for strip mined coal, which is the type of coal which Phillips Coal Company produced, is not the national average for all coal must be considered.

By Mr. Rayson:

Q. Mr. Smith, did you attend a meeting of the TVA directors with a number of men, including a representative of the United Mine Workers at some time in 1958? A. Yes.

Q. Would you state what transpired at this meeting, what the purpose of it was and so forth? A. Oh, it was mostly sort of a roundtable get together to exchange our respective gripes and to try to see if we couldn't get some constructive

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reaction resulting from it. Most of it had to do with methods, procedures and stuff like that. A lot of people in the coal industry in a way had been beefing about TVA coal procurement policies and some of the people on the TVA had been beefing, I guess, about some of the coal producers' policies and whatnot. It was considered advantageous on the part of both interests, as I understand it, to sort of get together and let our hair down and talk across the table.

Q. Who was the representative present from the
2891 United Mine Workers, do you know? A. Mr. Widman.

Q. What was he saying there, if anything? A. He had very little to say. Appeared to be more as an observer. As I recall, the latter part of the meeting, the very last of the meeting, he made a rather general statement that there had been an awful lot of complaints at his membership level about TVA coal procurement policies and all that and he was there to sit across the table from the board of directors and the various people charged with the coal procurement for the TVA to hear their side of it as much as anything else, and also as a duly authorized representative to uphold the interest of his membership. His whole statement — and he just made the one statement, as I recall, more or less in generalities. They wanted to — his organization wanted to do anything that was within their power to assist the situation. It was mostly as an observer to determine what was going on and what the attitude of the TVA was.

Mr. Rayson: Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Smith, do you know whether or not Consolidation Coal Company acquired Pocahontas Fuel Company in 1953?

A. Consolidation Coal Company did not acquire them
2892 in 1953, as I recall it. In fact, I know they didn't.

Q. Pocahontas was acquired by Consolidation Coal Company some time before this merger? A. Oh, the whole thing was a merger. The Consolidation Coal Company

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agreed to exchange its stock for Pocahontas Fuel Company. That thing happened along somewhere in the late '50's.

Q. I am talking about the control of Pocahontas. A. Pocahontas Fuel Company was an independent company, right up until the date of the merger.

Q. When was the merger? A. It was along in the late 50's. I couldn't tell you exactly. I ought to be able to, but I can't tell you. It is a matter of public record.

A. But in 1953, Pocahontas Fuel Company was an independent company and Consolidation Coal Company had no interest in it whatsoever.

By Mr. Rowntree:

Q. In 1953, December, the mine in Anderson County was acquired by Pocahontas Fuel Company? A. I believe the deal went through December 15th or December 14, 1953.

Q. It was in that period of time that TVA was 2893 commencing its great expansions of TVA power plants? A. Oh, yes. Yes.

Q. Talking about the spot coal prices — I mean the strip coal prices, it is true that strip coal is sold on the basis of quality, the same as underground coal, in utility markets?

A. Well, yes, all utilities, that is any of them that I know anything about, buy on the basis of cost per million BTU's. Some of them have a little different formula from the others, but in the end it is the same thing. It is the heat unit that is in the coal.

Q. I believe you indicated that strip coal quite often is bitten off out of the ground and gulped up by the machines, containing a lot of mud, debris and so on? A. That is true.

Q. And that would naturally lower its value with all of that debris in it? A. I would think so, unless something was done to get it out or improve it between there and where it was going to be used.

Q. Where is the great amount of strip coal mining done? Could you give us some idea? A. Oh, tonnage wise and all that, I would say through the middle west, Indiana, Illinois,

western Kentucky. There is some done in Alabama. There is quite a bit done in Pennsylvania now and Ohio, and 2894 west of the Mississippi River, Kansas — I believe Kansas, but I am not sure, Oklahoma, I know, and Arkansas, and Missouri, and Iowa. The big majority of it is in what we call the central western basin, the big production.

Q. Would you say as much as two-thirds of it is done in that basin? A. Just my offhand guess would be yes. I would think so.

The Court: Two-thirds of the nation?

Mr. Rowntree: Strip coal comes from the middle western basin, the coal field.

The Court: Two thirds of it?

The Witness: Of the total strip, that would be.

Mr. Rowntree: Two-thirds of the strip bituminous coal comes from this middle western basin, field of coal.

By Mr. Rowntree:

Q. In other words, I believe there are something like 116 million tons stripped? A. What is it now? 25 or 26 per cent, the total production I believe is the last figure.

Q. How much? A. I think it is around 25 or 26 per cent, isn't it?

2895 Q. Something like that. A. I can't remember these things. There are so many of them. That is my idea.

Q. About 25 per cent. A. It is all a matter of record. The Bureau of Mines gets those figures out every year.

The Court: Well, is there any figure, gentlemen, anywhere showing how the strip coal in Tennessee compares proportionately to the strip coal all over the nation? Are there any figures bearing on whether or not this average price as stated by the Bureau of Mines —

Mr. Rowntree: We could probably find one, but we say that price is depressed.

The Court: Sir?

Mr. Rowntree: We can probably find one, but we say

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that price is depressed. That is the price we say is depressed.

The Court: Yes. But before it was depressed, as you say it was depressed, what the Court and jury are interested in is whether or not this average figure as established by the Bureau of Mines is applicable to Tennessee. Now that is the question.

Mr. Rayson: Your Honor, we brought out the national average price of strip mined coal in as much as Mr. 2896 Rowntree had brought out the national average price for all coals. We felt if you are going to use a national average, you ought to use a national average for the same kind of coal that Mr. Phillips was producing. On that same chart — as I said, the names of the states were obliterated in the Verifax process, but it shows the state by state breakdown of the average strip mine prices in each state. It shows what it was in Tennessee for those two years.

Mr. Rowntree: We say we have to go to an earlier figure. I haven't gotten hold of an earlier figure.

Mr. Rayson: In answer to that, your Honor, we say that he used the same national average prices for those same years, except he wasn't referring to strip mined coal, he was referring to all kinds of coal, which, as the witness says and this book shows, was a much higher price on the average than strip mined coal.

Mr. Rowntree: Of course, we are saying that the national price was not depressed. The Tennessee price was depressed, and we have to now make an analysis of this national strip price with the national average price for all coal.

2897 The Court: As I understand it, you are claiming there as damages the difference between what you claim is the depressed price that your clients received in 1957 and 1958, and the average price of coal throughout the nation.

Mr. Rowntree: That's right.

The Court: That is to say you, hypothetically speaking,

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you are claiming that the depressed price that your client received during those years was three dollars in round figures, and you are claiminig that the national average was \$4.50 during those years, and the difference between three dollars and four dollars or \$4.50 is your damage?

Mr. Rowntree: That's right.

The Court: Now, do I understand your theory?

Mr. Rowntree: That's correct.

The Court: Now what the Court and jury is trying to find out is what bearing, if any, does the national average price have in relation to the price of Tennessee during these two years, 1957 and '58.

Now, if you can throw light on that subject, then, of course, that should be done. I think you are hitting at it, but I think you may have to get a slide rule to figure it out the way you are hitting at it, and I don't know of any mathematician who can do that and use the slide rule.

2898 I know one that can't who is in the Courtroom.

Mr. Rayson: If Your Honor please, may we inquire of counsel if they are still insisting that the national average of all coals rather than the national average of strip mine coals has relevance in this case?

Mr. Rowntree: Yes, indeed, we certainly do. We see no other figure that can be used. We think that all other figures have imponderables that cannot be used to compare with the price that we got. That is our position.

Mr. Rayson: Your Honor, we objected to the use of the national average figure when it was introduced.

The Court: I know you did.

Mr. Rayson: And if Your Honor will recall, John Amos testified he didn't know what the national average figure was made up, and certainly if there are imponderables in the national average price for all coals, which would include strip, underground, and auger coal, there are more Certainly in order to make a comparison in the average

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price in Tennessee and the average price in the nation, you have got to have something to compare.

2899 The Court: The market in Tennessee must be comparable to the national market.

Mr. Rayson: Exactly, and the type of mining in Tennessee must be comparable to the type of mining you are talking about on the national average market.

The Court: That's right.

Mr. Rowntree: And the quality of the coal must be comparable.

The Court: That's right.

Mr. Rayson: And the transportation and all these other factors.

The Court: That's right.

Mr. Rayson: They must be comparable.

The Court: That's right, those are relevant factors.

Mr. Rayson: I think the thing we are talking about here, and the thing that the cross plaintiffs' own exhibits show is that the national average price for strip mine coal was way below the national average price for all coal, and there are reasons for that as this witness has explained.

Mr. Rowntree: And we were starting to analyze that testimony, Your Honor.

The Court: All right, you may continue. Go ahead.

By Mr. Rowntree:

Q. And about two-thirds of the strip coal mined in the country does come from this midwestern basin of the coal fields? A. That would be my opinion now.

Q. And would you say that the East Tennessee coal is of better or lesser or poorer quality than the coal from the middle western basin? A. Are you talking about it in the ground or delivered to the customer?

Q. I am talking about underground. A. Well, underground, the Tennessee seams are what we call a stronger coal than the coals in the middle western basin. I mean it

all goes back to your pure fuel value, and that is ash and moisture free, and your Tennessee coals, most of them —

2901 By Mr. Rowntree:

Q. Mr. Smith, will you look at Exhibit 114, page five, and see on there what the BTU or quality of the coal, say, in Illinois is shown on there? A. Just any of these places up and down here?

Q. Well, take Illinois. A. Sir?

Q. Illinois coal would come largely from this midwestern basin? A. Well, your first section mostly shows Illinois origin coals.

Q. Yes, sir. A. And 10,299, 10,850 —

Q. I think there is a combined average. A. Oh, 10,971 is the average, and of course there is some in Kentucky and some Indiana coal mixed in that.

2902 Q. That is all from this midwestern basin? A.

That's right, it is all from the middle western — well, now, let me see.

Q. That is ten thousand — A. Yeah, that's all from the middle western field.

Q. And what is it? A. 10,971, I believe it is.

Q. And that is coal from different part of that basin? A. Well, it seems to be mostly from Illinois, some from Indiana, and some from Kentucky, but more or less minor things.

Q. That would be western Kentucky? A. Western Kentucky, yes.

Q. And would you say that 10,971 BTU quality analysis would be representative of the coal of that middle western basin? A. No, sir.

Q. What would be a representative figure? A. Well, may I mention seams and such.

Q. Well — can you find — A. Because one seam —

Q. Can you find in that book there a representative figure as a combined total that would fit more easily your

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2903 opinion as to the proper analysis? A. Oh, I'd say — now you are referring to the whole of the strip area in Ohio, Indiana, Illinois, and western Kentucky.

Q. I want to compare that area generally, generally, with your experience. A. My experience there would be on a BTU basis from about eleven thousand up to, oh, twelve five.

Q. Can you find any coal in that book there in the middle western basin that is twelve five? A. I know there's plenty. The Washington Number Eleven in Kentucky will do that; Number Six Washington, Illinois, will do that.

Q. Is that — A. The Pittsburgh Number Eight in Ohio, which is a large strip tonnage washed, will do that.

Q. Are these — A. I have bid in the past on those kind of guarantee for washed and stripped coal.

Q. Will you look in the book there, Mr. Smith, and see — you have already mentioned the qualitative analysis in Illinois. A. Yes.

Q. 10,971. A. Yes.

The Court: Is that per pound?

2904 Mr. Rowntree: That's right.

The Witness: That is the average of the consumption of all Illinois utilities, I believe, isn't it?
By Mr. Rowntree:

Q. Yes, sir, and that would be representative, would it not, of the Illinois coal? A. Not altogether, I wouldn't think so. There's an awful lot of dust that is the result of the by product of the operation, particularly of the southern Illinois, of the Illinois stripping mines.

Q. Let me suggest — A. That will run down, I guess it won't run eight thousand BTU's or nine thousand BTU's, that is just dust.

Q. Yes, sir. A. And it is sizeable.

Q. And that is after screening? A. Sir?

Q. Is that after screenings? A. Well it is just — it is whatever is left over.

Q. Yes, sir. And that is called carbon? A. No, some of it is even worse than carbon. It is just fine dust. It is recovered. It's gone in the washing plant and been recovered. They try to squeeze every BTU they can out of this thing, and the reason why it is that low, in many instances on an as-received basis that includes the moisture, you know, that comes, and some of it runs fifteen to eighteen per cent moisture.

Q. And that is sold on the market, too? A. Oh, yes, TVA bought some of it.

Q. And that enters into this national average price? A. I would say it does.

Q. Yes, sir. And will you check one more state, check say Indiana, see what the BTU runs there? A. 11,247.

Q. 11,247? A. Yes.

Q. And that is another representative state of coals from the middle western basin? A. Pretty much so, I'd say, yeah.

2906 Q. Mr. Smith, it doesn't make any difference to a consumer whether the coal comes from a stripping machine or from a continuous miner underground, so long as the quality of the coal is the same? A. Well, there's something besides quality as far as the consumer is concerned, it's reliability and responsibility of supply that enters in there too.

Q. The size of the company? A. I mean when the consumer buys his coal, why in addition to getting the quality that he expects to get, he also wants to get the service and the continuity of shipments and regularity of shipments, and also consistency of quality.

That all enters into the price at which he is willing to pay for coal.

Q. And this business and continuity and so on, has that resulted in many of the great utility markets being put under long-term contracts? A. I'd say that there are quite

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a few long-term utility contracts for very good reasons. It costs — when you build an electric generating plant, it will cost from one hundred thirty to a hundred fifty dollars per KW, and you build a million KW plant, that is a hundred and fifty million dollars investment, which you don't have the money — I mean I am putting myself as a utility — and there's only one way you can get that
2907 money, and that is to float bonds or sell stock or something, or just short-term loans, but for a thing like that, it has to be a long-term loan which means you have to go to the investment bankers, and the rule of thumb on a thing like that, among the utilities, I'd say they are financed by bonded debt at least sixty per cent, and in many instances, as much as eighty or ninety per cent of the cost of that plant.

2908 Now these bonds, the utility just sells them to the investment banker. The utility does not sell them to the public. The investment banker in turn sells to the public, and the investment banker is naturally interested in those bonds he bought for sale. And while he can see this plant there that cost \$150,000,000, the plant is of no use whatever unless there is a responsible, reliable source of supply behind that plant to produce the product that the plant is going to sell from which the utility will be able to make the interest and amortization payments on the bonds.

Q. And that is the reason — A. That is just good sound business.

Q. And that is the reason why many of the utility markets have been making these big long term contracts for their supply of coal? A. Well, that is one of the reasons, and the other thing, you know, every utility in itself is a controlled monopoly. They are the only ones that have protected areas and they have obligations to deliver power at such and such rates, and all that, and they have to know pretty well, or should know pretty well long range what the fuel cost is going to be and where the fuel is coming from.

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2910 Q. Would you have an opinion, Mr. Smith, as to whether or not, regardless of any labor contract, the policy or requirement of one of these large coal companies that you have these large term contracts with utilities, that would prevent that company from buying small company coal; do you have an opinion whether or not that would seriously hurt the small coal companies of the country? A. I just would not know about that, Mr. Rowntree. My experience in the companies I represent for the most part by and large, mine and ship their own coal, and that is it.

Now in our contracts we specify where the coal is coming from and who is producing it, and that is the contract.

Now as far as going outside and pulling someone else in it, I just don't know. I don't know too much about
2911 that.

Q. You are familiar with the fact, are you not, Mr. Smith? A. There is such thing being done. I don't know whether on the part of a large company or small company, or maybe Mr. Phillips did it for all I know. I have seen some of these TVA contracts where there are as many as ten or fifteen, in some instances as many as thirty, so-called subcontractors.

Q. Let's be specific about this now. Isn't it true, will you state whether or not it is true Consolidation Coal Company buys a lot of coal from other operating companies? A. I am not in a position to say that on the part of Consolidation Coal Company, because my connection with Consolidation Coal Company is exclusive sales agent for their properties down here, and to my certain knowledge they have only upon one occasion bought any outside coal down here. And that was when there was no bills on the railroad and they bought up about 15 or 20, maybe 30, cars of coal to fix up the car supply.

Q. That is in regard to a local contract? A. What?

Q. Was that with regard to a local contract? A. No.

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2912 There was one of the mines on the Tennessee Railroad that was blocked out and the Tennessee Railroad car supply is rated by the Southern Railroad as one car supply.

In other words, at our mine we never had a no bill after we went back to work in '55. But there are other mines on the Tennessee Railroad that had what might be termed as no bills. That is coal loaded in the cars for which if it is sold they can't ship it or it isn't sold, they can't ship it, and when those no bills mount up to 25 per cent of the total Tennessee Railroad rating why the Southern Railroad, under I.C.C. rules, will not give the Tennessee Railroad any more empty cars.

So upon one occasion, why the Consolidation Coal Company took on, I believe 15 or 20 cars of coal that somebody else on the line had loaded to remove no bills. And incidentally, the quality of coal was such that we were very disappointed but we did maintain our car supply, and that is the only occasion — and even before Consolidation, Pocahontas Fuel Company, ran the mine.

Q. Mr. Smith, it is true, is it not, that Consolidation Coal Company has subsidiaries and affiliated companies that operate large loading facilities on the Great Lakes, transfer stations, coal selling agencies, that buy coal in considerable quantity, or did before 1959 at least, from other companies? A. Oh yes, yes.

2913 Q. Now — A. You are talking about Northwestern-Hanna and —

Q. That's right. A. — things like that. Surely.

Q. Now we have talked about these — A. You realize, of course, I am not an employee of Consolidation Coal Company.

Q. Sometimes it is hard to determine. A. I am their exclusive sales agent.

Q. Sometimes it is hard to differentiate, isn't it, Mr. Smith? A. I guess that is true.

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Q. I notice a while ago you talked about when "we did do stripping at our mine out here at Trimore". You do very closely — A. You see, I negotiated the sale of those properties to Pocahontas Fuel Company and they have sort of left the sales responsibility to me. You did get the "we" in there, no doubt about it.

2915 By Mr. Rowntree:

Q. This contract that was made by Inter-Mountain Coal Sales, Mr. Smith, in 1956, December I believe — perhaps our exhibit was in error in mentioning two contracts, but we cannot distinguish it from the TVA award sheet. Will you look at that and say whether or not that does show two contracts for five thousand tons each?

A. (Continuing) There should be a sub-note by it some way. Wait a minute, let's see.

Here it is right here, right down at the bottom, 2916 the bottom note on the page. A total of 5,000 tons per week is to be delivered from Trimore and/or Moore.

Q. And/or Moore? A. One of them. The shipping point is the same, but one of them was from the Moore mine, which was then in existence. The other from the Trimore mine, and different analyses were bid on the two different mines, and we reserve the right to ship from either mine as we saw fit.

We did obligate ourselves to 5,000 tons per week and it was specifically stated that was the only obligation.

Q. Do you recall which mine that coal was shipped from?

A. From both. It was started out with the idea of being shipped from Trimore, and, as a matter of fact we were delayed in getting that contract for two or three weeks because some of the people down at the TVA were wondering what our obligation was there and would we fulfill it because we named two sources.

The Court: Trimore is an Anderson County mine?

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The Witness: These two mines were across the road from each other. They are in Anderson County.

2917 A. (Continuing) And that we finally convinced them that despite the naming of the two sources it was a responsible contract, and we had a bitter experience in having to prove it in several weeks.

The motor at Trimore got off the incline and was down for two or three months and we had to ship everything from the Moore mine for weeks.

The Court: From the Moore mine?

A. (Continuing) We got back in operation, why most of it went from the Trimore mine then.

Q. And your price at one mine there in December, 1956 was \$3.90, and at the other mine was \$4.10. That the price at the mine. A. F.o.b. mine. I believe that is correct.

Q. And your price at the mine in your contract of 1959 was \$4.05, is that correct? A. F.o.b. mine. I believe that is correct, yes.

2918 Q. Your price did not go down in this interval of 1956 to 1959? A. No.

Q. Talking about coal mines of Tennessee, Consolidation has only these two mines out there in Anderson County? A. That is right.

Q. And could you tell us what years those two mines were operating in this period since 1953? A. We acquired them in December, 1953, and we shut them down in, I believe it was June 30, 1954, and they were idle until July, 1955 when I negotiated a two year contract with Georgia Power.

We started back, oh; about July 7th, I think, of 1955, and just started Moore. We did not start Trimore and left it idle. And we ran Moore. The contract was for two years, 300,000 tons annually, as I recall, and we ran Moore through 19 — — wait a minute. Let me get some figures. When I

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get back on these dates I will be saying 1943 and 1955, and I want to be sure.

2919 Well, let's see. We reopened — Moore just ran from then on. In fact, never missed a work day until they worked out in April, I believe, of '59.

We reopened Trimore in April of '56 with that experimental thing that I was telling you about with TVA with a mechanical miner, and just a six months or 50,000 tons trial run to see how it worked out.

Q. How did it work? A. It didn't.

Q. What was the trouble? A. Well, we just had conditions there just not satisfactory for that particular miner and it so happened that we have been pretty successful with Joy loaders and buggies anyway. Crews more accustomed to that type of mining.

Q. How thick a seam do you have? A. In the Moore mine, think it averaged — of course, it has worked out now — it averaged pretty close to 60 inches, I think, 55 or 60 inches. In Trimore, we are averaging in the neighborhood of 44 inches, I would say. When I say we, I don't mean that I am, Consolidation Coal Company. That is the way it is. Then we made that contract with TVA in December of '56, so we kept Trimore running through '57. That was a 13 month contract. It was December 1st, '56 through the calendar year 1957.

Q. Let me ask, was Trimore operating in '59? A. 2920 We started it—well, let me see when we started it. It produced 2,400 tons yesterday. Trimore started back in operation in May of 1959. In fact, all the coal we have produced has been from the Trimore operation since then. Moore worked out last April.

Q. How much coal did Consolidation produce out there in '59, do you know? A. In 1959?

Q. Yes, sir. A. Wait a minute. Let's see. 225,136.40 tons.

Q. How much? A. 225,136.40. Now that may vary a few tons. That is what we sold.

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Q. That is one of the Class 2 mines in Tennessee? A. What is that?

Q. Is that a Class 2 mine? A. When you get into this Class 1 and Class 2, I don't know too much about that, because I am altogether with sales.

Q. I believe the records of the Bureau of Mines show that Tennessee has five Class 2 mines. Would you say that this is one of them? A. If it has to do with tonnage, I would certainly think so.

Mr. Rowntree: I believe that is 200,000 to 500,000
2921 Mr. Combs: Yes, that is right.

By Mr. Rowntree:

Q. Do you know what the other Class 2 mines of Tennessee are? A. When, now?

Q. Say in 1959. A. In '59, I would say Bessemer Coal, Iron & Land Mine at Windrock.

Q. Is that mine in operation now? A. Yes, so far as I know it is, yes. And Pittston-Clinchfield Meadowcreek mine out at Monterey.

Q. What is the name of that mine? A. Meadowcreek I believe they refer to it.

Q. That is Pittston? A. Pittston and Clinchfield Coal Companies. Let's see, that is three of them. I don't know whether Kentucky Ridge, I don't whether that is listed in Tennessee or Kentucky. I believe it is listed in Kentucky. It is a member of our Southern Appalachian Coal Operators Association. I sometimes confuse it. I believe Tennessee Products had a mine. What did they call it? Reelco or something like that. It is possibly still there.

Q. Is that still in operation or do you know? A. I don't know. I imagine it is. I don't get into that field too
2922 much.

Mr. Kramer: It is operating.

By Mr. Rowntree:

Q. What about Tennessee Consolidated? A. Whether Tennessee Consolidated had a mine in '59 I don't recall or

not. They had a mine — I would think if it was running, it would have produced about that.

Q. Now we have talked about these steam plants over here and where the coal comes from or can come from. Is it not true that the Clinchfield of Pittston Company is located at Monterey, Monterey, Tennessee? — A. Yes.

Q. About where would that be? A. It is almost due east from the Kingston plant. It is not very far out there: Crossville, or some place out there in that general area.

Q. It is say half-way between Crossville and Cookeville? A. I would have to look at the map.

Mr. Rayson: We will agree to that.

The Court: Monterey is 100 miles from Nashville.

That is what the marker shows on the road.

By Mr. Rowntree:

Q. That would put it about half-way between Nashville and Knoxville, wouldn't it? A. About that.

2923 Q. That Pittston mine at Monterey has been a big shipper to the John Sevier plant, has it not? A. No indeed. It has been a major shipper to the Kingston plant. It doesn't even have a rate to John Sevier. You are thinking of — well, you are thinking of a Virginia operation that goes to John Sevier.

Mr. Kramer: Speak a little louder.

A. Meadowcreek couldn't possibly go to John Sevier. Doesn't have a rate up there.

By Mr. Rowntree:

Q. Well, the Pittston Company does sell a lot of coal to John Sevier? A. Yes, from some of their Virginia properties.

2924 Q. Isn't it true that they have taken over two-thirds of the coal selling to the John Sevier plant?

A. No, I wouldn't think so. Stonega Coal Company, General Coal Company has a contract there now.

Q. Do you recall — A. That shouldn't represent — they have got a right fairly substantial contract there.

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Q. Do you recall that Pittston Company made two contracts with TVA in 1959, each for 10,000 tons a week for the John Sevier plant? A. I recall one for 10,000 tons a week. I don't recall the second one. I know they made a second one at a later date. I didn't believe it was, or I don't believe it was for another 10,000. I think it was for 5 or 6. I may have been mistaken. All I did was just look at it and try to keep track of what the competition was doing.

Q. We refer here to Exhibit 82, 10,000 tons per week contract, Pittston-Clinchfield. A. Is that for 18 months or 12 months?

Q. That is 18 months. A. That was the first one. I see you have it here in this exhibit. I am sure they made another one. I don't recall the tonnage.

Q. A 10,000 ton contract per week would be 520,000 tons a year? A. Yes.

2925 Q. If there are two of them, that would be a million tons or a little over? A. Yes, surely.

Q. The first one was dated March 6, 1959, 10,000 tons per week. A. That is right.

Q. The next one is dated May 28, 1959, for 10,000 tons per week. A. Yes.

Q. So that makes a total of 1,040,000 tons a year? A. About that, yes.

Q. And the plant consumed around one million and a half tons per year? A. Yes, roughly.

Q. So Pittston was supplying two-thirds of the plant requirements of the John Sevier plant? A. As of that particular time, yes.

2926 Q. Now is it not true that the rail rates are a flexible thing, particularly with a government market? A. Well, rail rates, they are open to negotiation. You have got the volume of traffic — for example, my job of selling is as much trying to negotiate rate

reductions as it is selling coal. They are not as flexible as I would like to have them.

Q. Those things change quite often? A. Oh, yes, they change.

Q. Isn't it true that west Kentucky coal now has a freight rate to the furthest TVA steam plant down at Watts Bar that makes the west Kentucky coal competitive with the Tennessee coal?

Mr. Rayson: If your Honor please, we object to that. We don't think it has any relevancy whatsoever. The West Kentucky Coal Company does not set the rail rates. They are set by the Interstate Commerce Commission.

The Court: Overruled.

A. What was that?

By Mr. Rowntree:

Q. Isn't it true that west Kentucky now has a competitive rail rate to the farthest TVA steam plant at Widows Creek?

A. I believe they have. I think they have got a rate 2927 down there.

Q. Isn't it true, Mr. Smith — A. Just how competitive with what now?

Q. Competitive with the Tennessee coal. A. Competitive with the southern Tennessee coal, yes.

Q. Well, if it is competitive with the southern Tennessee coal, well, it is certainly competitive — A. As far as our Tennessee mines up here are concerned, we have never shipped a pound of coal to Widows Creek and I don't think ever will.

Q. I am talking about west Kentucky and the Tennessee coal. A. But you are talking about where west Kentucky is competitive with Tennessee coal, and I am telling you that with certain Tennessee coals, it is not, they just don't move down there. If you are talking about southern Tennessee, I agree.

Q. Southern Tennessee was supplying Widows Creek, is that right? A. And still is.

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Q. Isn't it true that on the last bid award of TVA that the west Kentucky supplier came out with more than half of the award? A. You mean for the overall system?

2928 Q. For Widows Creek. A. For Widow's Creek?

Q. Yes, sir. A. I wouldn't know. That may be so. It is all a matter of record. Now whether it was awarded to Widows Creek, I don't know.

Q. Well, this coal can really hit most anywhere, 2929 can't it? A. Not most anywhere, no. It can go —

Q. It can go to the farthest plant, can't it, from West Kentucky? A. It can go to Widow's Creek on a certain basis. I mean that rate is what — what is that rate, a dollar forty-five, isn't it, that they named-down there, and I think your minimum rail rate from the southern Tennessee mines is around sixty, sixty-five cents, something about like that. From western Kentucky mines \$1.40, and from the southern Tennessee mines, \$.60.

Q. I believe I was talking about the furtherest plant. I think one plant, John Sevier over here, is further.

2930 A. Well, Kingston and John Sevier. Kingston is further, too.

Q. Well, we could take a divider on it. I am not sure, those three may be in a circle. If a circle was drawn around the west Kentucky field, those three plants — Widow's Creek, Watts Bar and Kingston — might hit on the circle, wouldn't they, pretty close? A. If you just draw a circle, I don't know, frankly, but we always considered Kingston and John Sevier as much farther than Widow's Creek.

Q. What contract are you talking about now? A. This John Sevier-Pittston-Clinchfield that you brought 2931 up.

Q. Now what about the contract? A. There was a period in there when the TVA at John Sevier did not take Southern Railroad coal because of an argument over some of the details in the Section 22 quotations.

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Q. Well, arguments come up in business all the time, don't they? A. That's right.

Mr. Rowntree: All right.

Mr. Kramer: When you say "Southern Railroad coal", you mean delivered by Southern?

The Witness: All of it is delivered by Southern, I mean Southern Railroad origin.

2932 By Mr. Rowntree:

Q. The Consolidation Coal Company was selling its coal to TVA on these contracts we have been talking about for around four dollars a ton? A. I beg your pardon?

Q. Around four dollars a ton? A. Well, this current contract is at \$4.05 a ton, which Consolidation —

Q. And it is — A. It is Consolidation's Coal, yes.

Q. And those earlier contracts, term contracts were \$3.90 and \$4.10? A. Well —

Q. In that vicinity? A. I believe so, either that or 2933 it might have been \$3.90 and \$4.20, and of course, that was Pocahontas Fuel Company as a company at that time.

Q. Would you say, Mr. Smith, that the price of TVA coal was depressed in comparison with utility steam coal in other parts of the country? A. As of the present time?

Q. In the period of 1956 through 1958. A. Yes, and no. Now I guess for the country as a whole, why perhaps so, and yet other privately owned utilities were — some in the Carolinas were paying about the same price as TVA.

Q. Would you compare it with the midwestern market? A. With the midwestern utility market?

Q. Yes, sir. A. Well, my opinion would be it was somewhat depressed as compared to that market, yes.

Q. It was what? A. Somewhat depressed as compared with that market.

Q. Yes, sir. A. It's pretty hard to tell. It's all based on

Testimony of Patrick B. C. Smith

cost per mile delivered, and the FOB mine price is a little different on that.

2934. Q. The price of four dollars, or approximately four dollars, I believe you state a while ago, on direct examination, that you entered your bid at the lowest price that you could and make a profit? A. Well, that was our reasoning on the thing.

Q. Yes, sir. Is it not true that Consolidation Coal Company makes its profit from—I mean substantial profits in other mines in other parts of the country? A. Oh, yes, I am sure this is a very minor part of it.

Q. And it has some large mines—in what states does it have mines? A. Oh, as I recall, it has some in Ohio and Pennsylvania and—I don't believe it has any in east Kentucky any more, but I know it has them in Ohio and Pennsylvania, West Virginia.

Q. So it is relatively unimportant how much of a profit you make on the local operation here for Consolidation? A. Well, not the way they talk to me. It may be, but—

Q. But you did enter your price at the lowest amount you could and still live, with a profit? A. Well, on good business principles, give a reasonable return on the property
2935 and all of that. You know they don't hire sales agencies to lose money.

Q. What? A. They don't hire sales agencies to lose money, and so I am one hundred per cent a sales agency, so if my producer doesn't profit, I am out of business in a very short time.

Q. But you did enter a bid at the lowest price that you could and live, at a profit? A. Yes, at a reasonable profit.

Q. You stated there were certain reasons for a demand on the spot coal market at Kingston in 1956. Will you state when the units at Kingston, the generating units were completed? A. May I refer to my notes on that?

Q. Yes, sir. A. So I can give you the—the ninth one, I believe went on in December of '55. Now there may have

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been a little delay, they had a little trouble with number two and number three, I think.

Q. Was that one of the big ones? A. Yes, the last five were the big ones. The first four were the small ones.

Q. When was the one before that? A. The first one went on in February of '54, and they followed each other with a degree of regularity right up to December '55. I 2936 couldn't give you the exact dates.

Q. So it was in December, 1955, the month just before 1956 that this market had fully developed? A. So far as the burning — the plant was completed, as I understand it December '55-

The Court: That was which one?

The Witness: Kingston.

Mr. Rowntree: Kingston Steam Plant.

By Mr. Rowntree:

Q. I believe that you stated, Mr. Smith, that it is impossible to live solely off of the spot coal market? A. Well, that is my opinion, yes, sir.

Q. Now the spot coal market is a sizeable market, is it not? A. In the case of the TVA, and I presume that is what you are talking about.

Q. Yes, sir. A. It is rather a large tonnage, but in relationship to their overall purchases, why I'd say it would run maybe twenty, twenty-five per cent of their total purchases.

Q. And that is substantial — A. It may not run that high. Sometimes it is below that.

Q. That is quite substantial tonnage? A. In tonnages out of a total burn of twenty million tons, why, what is 2937 it? Five, isn't it?

Q. Five. Five million. A. Yes.

Q. And a coal producer producing twenty-five thousand to thirty-five thousand tons a year would have an ample market to ship coal into? A. Oh, yes, I mean you can — they can go down there and bid every Thursday.

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Q. So when you say you can't live off of the spot market alone, you are really talking about the price on the spot coal market? A. Yeah, I mean spot in itself means a temporary thing and involves a lot of distress coal and matters of convenience and things like that.

Q. And is it not true that the spot coal market offers an opportunity to experiment with new mines? A. Oh, yes. Yes.

Q. And it enables a company opening up a mine to experiment and then make its long-term plans later on? A. Oh, yes. Yes, indeed. That is one of the reasons for the spot coal market, as I understand.

Q. And it would be an ideal market for a small company starting up business to experiment on it? A. It certainly would. It would give them an idea of its quality and some idea of what its operating conditions are.

2938 Q. And is it not true that a small coal company would risk considerable hazards in entering into a long-term contract with limited financial resources, a term contract that would make demands month after month for a period of several months or even years? A. Well, of course that would depend on the quality of coal he has, how much coal he has under lease, and all of that.

Q. And whether he has financial resources to back up any periods of shutdown and what not? A. Oh, yes. Yes.

Q. And therefore is not the spot coal market a very vital market for small coal companies in the Tennessee Valley? A. I think they have used it as such. It would appear to be that way.

Q. And is it not true that a good way to hurt small companies or run them out of business in the Tennessee Valley would be to beat the spot market price down? A. Well, not necessarily. The spot market is designed as a matter of convenience to take distress coal off of the market, and whenever you have got a situation like that, the price is sort of secondary.

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Q. Well, of course, any market — A. I mean it is
2939 a convenience to the operator, it is a convenience to the TVA, because they are able to get coal that temporarily can't go somewhere else on a better realization, and if they get in a pinch like they did in '56, why they can just go out and buy coal on the spot market even if it costs them quite a bit.

Q. Of course, any market likes to buy cheap coal, distress coal? A. Oh, yes. Yes, sure.

Q. But a spot market would be ideally designed to accommodate the opening up of a new mine or for a small mine to operate upon? A. For a temporary period to find out what he had, yes.

Q. Give it time to grow? A. I don't know about that. It all depends on how much time you are talking about again.

Q. Again it depends on price? A. Well, I mean you can't expect too much in the way of price from a spot market.

Q. Why is that? A. From the nature of the thing itself. It is a spot market, involves distress coal, convenience coal, to get rid of it in a hurry and all of that, and I mean normally a man that is selling something on the spot
2940 market doing it in a hurry to get rid of a temporary inconvenience or temporary problem.

Q. And also it is subject to people dumping coal on that market at low prices. A. Well, I mean any time that you have distress coal — we call it dump coal — that you sell on the spot market.

Q. The coal from the west Kentucky field has long been committed to the public utility markets of the middlewest, is that right, before TVA generating systems? A.
2941 No, not so much so. You see, the west Kentucky — western Kentucky coal field was more or less an orphan field for years and years. Wherever they went with the coal they had no home market, and wherever they went they had to leap over another coal field to get to the consumer which meant that they had transportation charges

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to their disadvantage. And up until, along in the early '40's, I believe, why most of western Kentucky coal mines produced what we call raw coal, which was of much lower quality than they could produce after they put in these modern washing plants, and all that.

Starting in the early 40's, why they improved their product, their ultimate product. It has actually been by the installation of mechanical washers, and everything like that. And from about the early '40s on, why it got more and more important in the utility market particularly through the middle west. Prior to that there were a lot of utilities wouldn't use it because I used to have to sell some of it.

Q. And the coal from west Kentucky was being sold extensively in the middle western market? A. Yes, yes.

Q. And that coal — A. Up and down the Mississippi Valley most of it.

2942 Q. And that market has held up well, has it not, Mr. Smith, the middle western utility market? A. Yes, I would think so. I haven't been active in that particular market the last few years, but as far as I know it has.

Q. Is it not true that the western Kentucky coal, rather than being thrown in the middle western market to
2943 depress that market, has been thrown into the TVA market and has contributed to the depression of that market? A. As far as contributing to the depression of that market, I can't say, but as a practical measure of the distress spot coal they have had, West Kentucky, I would say a greater part has gone into the TVA market than the other market.

Because, frankly, the TVA spot market buys coal every Thursday of every week and makes awards every Friday. The middle western general market, why some of them buy maybe once a month, some of them don't buy at all. And there has been, I would say, distress spot coal from the western Kentucky coal fields sold to, shall we say northern

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utilities or middle west utilities just as it has been to the TVA, but my guess would be that a greater volume has been sold to the TVA because it is a much more convenient place—I mean, particularly for the fellow who is in the sales business.

Q. Now, Mr. Smith, please look now at Exhibit 113, page 90, and will you look under the east south central section there and state what states are included in the east south central region. A. Do you mind if I refer to the index?

Would they have somebody read it to me?

2944 Q. I think that page and the preceding page will show the states. A. The east south central would be Kentucky, Tennessee, Alabama, Mississippi. That is it, isn't it?

Q. That is Kentucky — A. Kentucky, Tennessee, Alabama —

Q. And Mississippi. A. And Mississippi.

Q. Now how much coal did Mississippi consume on utility steam coal in 1958?

Mr. Kramer: What page of that exhibit?

Mr. Rowntree: That is page 90.

A. Page 90. None, isn't it? Let's see.

Q. Look at '57. I think — A. '57? I don't see any here. I don't know.

Q. Is there — A. I am not sure just how they have got this particular thing. Is this the fuel units, thousands coal? Well, 4,000.

Q. Four thousand tons. So it is relatively insignificant with respect to the region as a whole? A. Oh, yes, very much so.

Q. And will you look at the east south central and see — that is the accumulated average for east south central — and see what the average cost per ton was in 1958?

2945 A. 1958 for coal, \$4.61, it looks like.

Q. \$4.61. A. That is correct.

Q. That is really the area covered by the TVA system,

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is that not right? A. Let's see. Kentucky and Tennessee and Alabama. I would think so, yes.

Q. That is \$4.61 cost for 1958? A. 1958.

Q. And there are some coal producing regions in that area, Kentucky, Tennessee and Alabama; right? A. Oh, yes, yes. All except Mississippi.

Q. And will you turn the pages this way and look for the east north central area. A. Yes. I was seeing where it said east north central continued, that is the way it started.

Q. Will you look there and state what states are contained in that region. A. Ohio, Indiana, Illinois, Michigan, Wisconsin — that is it.

2946 Q. There are large coal producing states involved in that region, too? A. Well, Ohio, Indiana and Illinois. Michigan at one time produced some coal but doesn't any longer. Three of them are coal producers.

Q. Ohio, Indiana and Illinois? A. That is right.

Q. Produce considerable more coal than Tennessee does, for instance? A. Ohio and Illinois, I think. Now, about Indiana, I have forgotten. I think they are right — they are all matters of public record there. I don't want to appear dumber than I am.

Yes, Indiana produces — yes, they produce more than Tennessee. I just want to make sure of that.

Q. We refer to the total tons produced in 1958 from Exhibit 116: Indiana, 1958, 16,149,000, as compared to Tennessee, 7,052,000. Illinois, 45,932,000. Ohio, 37,869,000.

Now will you look at the east north central average cost for the period 1958. A. \$6 it says here.

Q. And that is compared with \$4.61 in the TVA region?

2947 Q. Is that right? A. Yes.

Q. \$6 compared to \$4.61 in the TVA region? A. Yes. Those, of course, are delivered costs in both instances, I believe, are they not?

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Q. They have quite a bit of water transportation in the middle west, do they not? A. They have quite a bit, but even in that case the charges are much lower than they are down here.

Q. Well — A. I mean your barge rates are lower down here than they are up there. You can handle much larger tows down here on the river, handle these jumbo barges and all that. So the transportation charges for the east north central, all of which have gone into these figures, are 2948 considerably higher than for whatever the other one was that refers to this thing down here.

Q. Well, they have the Great Lakes system, too, don't they, to transport on? A. Yes, but the Great Lakes, there is no coal mine on the Great Lakes. It costs a good bit of money to get the coal to the Great Lakes before you put them on the boats up there. It is a right substantial rate. I guess the rate from — you are talking about the western Kentucky coal field to Chicago for trans-shipment by boat is probably two or three times what our rate from our mine to Kingston is. That is before it gets on the boat. Then you have a vessel rate on top of that, if you are taking it up through the Great Lakes.

Q. Well, we have variations in transportation in our region and they have variations in their region, but both regions are coal producing regions? A. Yes.

Q. And is it not true, Mr. Smith, that rail rates in the south have been disadvantageous to the southern producers as compared to the northern producers? A. No, I wouldn't say that.

Mr. Rowntree: That is all.

REDIRECT EXAMINATION

By Mr. Rayson:

Q. Mr. Smith, do you recall what the rail rate from 2949 the west Kentucky fields to Widows Creek was prior to its reduction in 1959? A. No, I wouldn't. I presume there was one down there.

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Q. Would a reduction of about a dollar on the ton sound approximately correct to you? A. You mean this new \$1.45 rate, does that represent a reduction of a dollar a ton?

Q. That is right. A. I would say at least that, yes.

Q. Would the present rate of \$1.45 from the west Kentucky field to Widows Creek—in other words, looking at Exhibit 145 from a place marked “West Kentucky Fields” and Widow’s Creek, do the southern Tennessee mines still have a freight advantage? A. Oh, yes. I think the minimum rate there is 60 cents, so they have about 85 cents, and they also have a quality advantage.

Q. So even discounting the quality advantage of the southern Tennessee mines, the fields in west Kentucky, the mines in west Kentucky are something in the order of an 80 cents disadvantage over the mines in southern Tennessee? A. That is right.

Q. Now you spoke of the Clinchfield mines in Virginia serving John Sevier. Do you know where those 2950 Clinchfield mines in Virginia are located? A. Yes, they are located at Carbo.

Q. Where? A. Carbo, Virginia on the N & W Railroad.

Q. Is that in the western part of Virginia? A. It is in what we call southwestern Virginia.

Q. This part of Virginia to which I am pointing (indicating)? A. Yes, right up in there. Yes, over near the Kentucky line.

Mr. Rayson: I will mark “Clinchfield” on the map, your Honor.

The Court: Yes, sir.

By Mr. Rayson:

Q. Do you have any idea what the rates are from the Clinchfield mines to John Sevier? A. One dollar—from Carbo, I believe it is a dollar—\$1.57½, I believe. Now that may be \$1.54½, but it was originally \$1.47½ and a 10 cent increase. I believe it is \$1.57½.

Q. Is it because of that freight rate that these mines

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here are competitive with John Sevier? A. Yes. The minimum freight rate to John Sevier as of the present time is \$1.35. That is off Southern Railroad mines and off the Interstate Railroad in southwest Virginia and the same general area as the Clinchfield mines. For example, the mines in Campbell County, why the current freight rate to John Sevier is \$1.45, I believe, 10 cents above the minimum.

Q. While we are talking about rail rates, do you know whether the Harlan or Hazard, Kentucky fields were competitive in the TVA market say prior to 1959? A. Well, the L & N put in some rates to Harriman, I believe, back in around '55, 1955 some time, with the idea of the coal moving to Harriman as the TVA owns a facility there for transshipment from car to barge. They ran a little barge movement. I think that Harriman facility can handle up to 40 or 50 tons a month and the TVA evaluated that barge movement, I believe, then at 50 cents a ton or maybe it was 45 cents a ton, so that the L & N rates, that is from Harlan, L & N, Jellico, but not Hazard, could move to Harriman at about 45 to 50 cents a ton above the Southern Railroad rates down there.

2952 Q. Well, now, has the Hazard Field become — A. Well, the —

Q. — part of the competitive situation in TVA presently? A. Yes, sir, and they cited these — this present TVA contract which was awarded in May and September to the Kingston Steam Plant, and the day those bids were open, why the L&N Railroad named a rate from the Hazard Field which we had never had before, named a rate of \$2.04.

In the meantime, why the L&N had arranged with the Tennessee Central to switch this coal coming to Harriman to the Kingston Steam Plant rather than have them ship it by barge. As long as it had to be shipped by barge, the limit of L&N origin tonnage to Kingston was maximum fifty

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thousand tons a month. After they arranged this switching arrangement with Tennessee Central to take the coal from Harriman to Emory Gap, the Kingston shipping point, of course they could bring in anything they wished, and the date those bids were opened, why just before the bid opening, the L&N announced this Hazard rate down there of \$2.04 which incidentally has since been reduced to \$2.02.

Q. Now you are referring to the bids which were submitted by the Kentucky Oak Coal Company in September and October of 1959? A. Yes, particularly in September 1953. That was the first one.

Q. That was it? A. It was in requisition 27.

Q. And I think — I believe you are looking at the contract shown on Exhibit 104? A. That's right.

Q. And you say that at the time that the first of these two bids by Kentucky Oak was submitted that the L&N reduced the rail rates to Kingston, is that right? A. That first bid there, the day those bids were open, about five minutes before the bids were opened, the reduction of the Hazard rate or the naming of the Hazard rate was announced.

Q. And how much was the reduction? A. Well, it was so much — I don't think there even was a Hazard rate down there.

Q. I see. Well, would the — under the prior conditions, would the Kentucky Oak bid have been competitive? A. Oh, no. No, indeed. The thing that made it competitive is this Section 22 freight rate quotation of \$2.04.

Q. Now, you mentioned the Monterey coal fields. I think that we previously identified their location as midway between Knoxville and Nashville at about the "K" of the Kingston Steam Plant. How far is the Monterey 2954 field from the Kingston Steam plant? A. Oh, my guess is forty, fifty miles. I don't know to tell you the truth.

Q. Is that on a direct rail route? A. Tennessee Central.

Q. Do you know what the rate is from that mine to King-

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ston? A. No, let's see. I think it is \$.93. It may be \$.92. I have forgotten whether that was seventeen or eighteen. They used to be twenty-eight.

Q. Do you have any idea what the rail rates are from the western Kentucky field over to Kingston? A. No, I mean they are so high that I never have paid much attention. In trying to figure out where West Kentucky would be competitively speaking at Kingston, why I have usually figured the transportation charges through Grand River and then to barge around the river.

Q. Do you know if there is a railroad that goes from west Kentucky — direct route? A. Oh, yes, the IC connects with the TC at Hopkinsville. IC serves west Kentucky, and so there would be a rail route down there.

Q. But even with that the rate would not permit competition? A. Oh, whatever the rate is, I mean if we in 2955 the East got up so high, you know, there is always — you can always get high enough to let competition come in from somewhere else, but as a normal thing, no.

Mr. Rayson: No further questions.

RE CROSS EXAMINATION

By Mr. Rowntree:

Q. This Kentucky Oak contract, that was a good sized contract, wasn't it? A. Yes, sir.

Q. That was — A. Eighty-five hundred tons, I believe, the first one.

Q. Eighty-five a week for ten years? A. Yes.

Q. And there was another one, too, was there not? A. There was what?

Q. Another contract? A. I believe in the next TVA requisition or bid opening, they bid additional — you say here four thousand. I think that is correct. My recollection is they have got about twelve thousand five hundred tons a week moving into there.

The Court: What is the date of that eighty-five 2956 hundred tons a week?

Mr. Rowntree: September 17, 1959, Your Honor.

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The Court: All right. What is the date of that other one?

Mr. Rowntree: October 30, 1959.

The Court: For how much?

Mr. Rowntree: Four thousand tons a week.

By Mr. Rowntree:

Q. So that is twelve thousand five hundred tons coming in each week from Kentucky Oak Coal Company by reason of this freight reduction? A. That's right.

Q. Announced five minutes — A. In other words, that whole producing area up there had no rates to Kingston prior to that L&N freight reduction and special Section 22 rate.

T. J. HOFFMAN

a witness called by and in behalf of the Cross Defendants,

2959

DIRECT EXAMINATION

By Mr. Rayson:

Q. Would you state your name, please? A. T. J. Hoffman, H-O-F-F-M-A-N.

Q. Where do you live, Mr. Hoffman? A. Business address, Madisonville, Kentucky.

2960 Q. And what is your employment? A. Employed by the West Kentucky Coal Company.

Q. What is your position with that company? A. Vice-president.

Q. May I ask your age, Mr. Hoffman? A. Seventy.

Q. How long have you been with West Kentucky Coal Company? A. Since September, 1909 with exception of 1917 and '18 when I was with the U. S. armed forces.

2961 Q. Do you recall when you became sales manager?

A. Well, no, sir, I don't know exactly, but I served about 25 years, then I was elected a vice-president in 1936.

Q. Have you been a vice-president since then? A. Yes, sir.

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Q. Have you continued to have responsibility for sales as a vice-president of the company? A. Well, as well as other activities.

Q. Have you had the responsibility for any particular area of sales? A. No particular area, only in a general way other than TVA.

Q. Have you sold coal to the TVA as an employee of the West Kentucky Coal Company? A. Yes, sir.

Q. Have you continued to look after its sales to the TVA? A. Yes, sir, I have.

Q. Do you hold any other offices or position other than as vice-president of West Kentucky Coal Company? A. Well, I am chairman of the board of Kentucky Coal Agency, Madisonville, Kentucky. And I am a member of the National Coal Association traffic committee, Washington, D. C.

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2962 Q. When did you first sell coal to the TVA? A. In 1944.

Q. What was the occasion of that sale to the TVA? A. Well, after soliciting an order for some time they finally gave me an order for coal for delivery in a barge at Caseyville, Kentucky. A. L. Metling Barge Line did the towing.

Q. Did your company barge coal at that time as well as ship coal by rail? A. No, sir, we did not. We had barges but we had no motive power.

Q. You had no what? A. No motive power.

Q. Before we go further with the questions of the witness, I want you to identify the location of West Kentucky on our map here. A. Yes, sir.

Q. I am speaking of West Kentucky Coal Company, Mr. Hoffman. Can you see where I am pointing on this map? A. Yes, I do.

2963 Q. I am pointing to Exhibit No. 145. Is this little nook in the river here the location, generally, of West Kentucky Coal Company mines? A. That is right.

Testimony of T. J. Hoffman

Q. In this general area here? A. That is right. The Uniontown mine is located in Union County on the Ohio River. It is seven miles from Morganfield, and the property in Hopkins and Muhlenberg County is about 85 miles from Paducah, Kentucky and 60 miles from Evansville, Indiana.

Q. Is the Uniontown mile also in this area marked on the map? A. That is right. Right on the Ohio River.

Q. Did you make any other sales to the TVA in the 1940s other than this contract that you worked out with them in 1944? A. Yes, sir.

Q. Did you sell very large quantities of coal to them? A. Well, I would say made sales to them that were very satisfactory as well as a rather small percentage of my company's total output.

Q. Do you recall the amount of the contract in 1944? A. I believe that was about 250,000 tons a year.

Q. Was that over an extended period of time? A. 2964 Yes, sir, it was.

Q. Now Mr. Hoffman, have you prepared a table of the sales of coal that your company has made, in round numbers, to the TVA from 1952 through 1959? A. Yes, sir.

Mr. Rayson: We would like to introduce that as our next Exhibit, your Honor.

(Exhibit No. 168 was marked for identification and filed.)

Mr. Rayson: May I say, your Honor, that the figures shown in the lefthand column under "TVA Total Receipts" indicates the amount of the tonnage of coal TVA received in those calendar years as testified to by Mr. Elmer Hill.

He did not testify as to the 1952 or 1953 and TVA records are on a fiscal year basis so we were unable to show that. By Mr. Rayson:

Q. Now are the tons shown in the middle column there under "Shipped by West Kentucky and Nashville" the total tonnage that your company shipped to TVA during the year shown on the extreme lefthand column? A. It is.

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Q. Does that include the tonnage you shipped to TVA both on term contracts and spot contracts, Mr. Hoffman? A. Yes, sir.

Q. Now starting with the year 1953, could you explain to us the amount of coal shown to have been shipped to TVA in that year? Will you explain the amount that was shipped on term contracts and the amount that was shipped on spot orders. A. 1953 there were 425,980 tons shipped on term contract, and 60,000 tons shipped on spot contracts. 1954 —

Q. Before you go further, Mr. Hoffman, does that indicate that your company obtained term contracts for 425,000 tons that year? Does that mean that term contracts obtained in previous years were being fulfilled in that year, or does it mean it was a combination of both? A. It was a combination of both.

Q. All right. Now in 1954 your sales to the TVA went up by approximately 300,000 tons — 330,000 tons. Would you explain the term and spot breakdown of that tonnage. A. There was a million fifty thousand tons on a term contract for 36 months, and that goes back to the year — well, that is not 1954 although that includes coal from Uniontown and we did not take over that property until October 1, 1955. That was a portion of the Nashville Coal property.

Q. And is it your testimony then that this 978,000 tons figure shown for 1954 includes a tonnage shipped by Nashville Coal Company? A. A contract that was in existence — a 36-months contract that we took over when we took over the property.

Q. You took over the Nashville Coal Company in the latter part of 1955, I believe. A. That is correct; yes, sir. And there was 110,000 tons on spot — 110,500.

Q. What was the situation in 1955? A. In 1955 we sold on term 195,000 tons over a 30-month period.

Q. Did you have several term contracts —
Mr. Rowntree: I didn't hear the answer.

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Q. — you were shipping on in 1955? A. Yes, from different mines.

A. (Continuing) That is from Pleasant View mine. In other words, we made several term contracts. Another 252,000 for 21 months, and another for 120,000 for 14 months.

Q. Mr. Hoffman, would you speak a little louder. I think the jury is having difficulty hearing you. A. Yes. 104,000 for 12 months; 117,000 for 18 months, and 228,300 for 2967 18 months. And during that period for spot we sold 93,000 tons.

Q. What percentage of the TVA market were your sales in 1955? A. 1955 it was 8 per cent — 9 per cent.

Q. Nine per cent? A. Yes, sir.

Q. And in the preceding year. I believe you have computed that to be 9.6 per cent, is that right? A. Yes, sir, that is right.

Q. Now in 1956 did you sell any spot coal to the TVA? A. We sold no spot coal but we made two term contracts. One for 468,000 tons for 36 months; one for 234,000 tons for 36 months.

Q. So it was the shipments on these contracts and term contracts you had in previous years which made up your total of 1,511,000 to TVA in 1956; is that correct? A. That is correct; yes, sir.

Q. Now does that include a tonnage from the Nashville Coal Company contract? A. Yes, sir, it includes all tonnages.

Q. Do you know how much that was on a yearly basis? A. You mean from Nashville?

2968 Q. Yes. A. Well, only that portion of it that was carried through from previous years where there was a long term contract.

Q. Now you have testified that the Nashville Coal Company which you acquired in 1955, had a contract with the

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TVA calling for a million fifty thousand tons over a three-year period. A. That is correct. It expired in 1957.

2969 Q. And this was a contract which your company inherited when you acquired the Nashville Coal Company, is that correct? A. Yes, sir, that is so.

Q. Is the tonnage indicated by that Nashville Coal Company contract indicated in the 1955 and '56 figures? A. Yes, sir, it is.

Q. Is the Nashville Coal Company the company that was owned by Justin Potter prior to your acquisition of it? A. Yes, and associates. I don't know that he was the sole owner.

Q. All right. What —

The Court: Where were their mines located at that time?

The Witness: Western Kentucky, adjacent to our property.

The Court: How many mines did they have?

The Witness: At that time they had about five mines.

The Court: All right.

By Mr. Rayson:

Q. The Uniontown mine to which you referred was 2970 a Nashville Coal Company mine, was it not? A. That is right. But Nashville Coal Company's charter was surrendered when we obtained the property to the State of Tennessee. It was a Tennessee corporation. Then the Nashville Coal, Inc. was created which is a Kentucky corporation and which is a wholly owned subsidiary of West Kentucky Coal Company.

Q. All right, sir. What percentage of the TVA market did West Kentucky Coal Company and Nashville Coal Company have in 1956? A. 7.4 per cent.

Q. Now in 1957 what was your total tonnage to the TVA? A. 963,384 tons.

Q. Did your company have a number of contracts which came — with TVA, which came to an end in that year? A. Yes, it did.

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Q. Did the Nashville Coal Company contract which you had inherited from the Justin Potter company terminate during that year? A. Yes, it did.

Q. Do you recall when that terminated? A. I think along about June.

Q. And what was then the amount of this 963,000 tons which you sold to the TVA which was on a spot 2971 order basis? A. In 1957, there was 313,000 tons.

Q. So in 1956, whereas you had orders to the TVA for approximately a million and a half tons, all on a term basis, in 1957 you had term orders with the TVA for approximately 600,000 tons and the balance of your tonnage to TVA was on the spot order market, is that correct? A. That is correct. I was unable to continue the Uniontown contract after its expiration on a term basis.

Q. I see. Now what percentage of the TVA market did your 1957 sales to TVA represent? A. 4.9 per cent.

Q. Now in 1958 this chart indicates that your sales to the TVA increased slightly, 1,094,396 tons, is that correct? A. That is correct, yes, sir.

Q. And what part of that tonnage constituted the sale of coal on term contracts to the TVA and what part constituted the sale on the spot contract basis? A. Well, there was 624,000 tons sold from rail mines on a 36 months basis. 936,000 tons sold for delivery over 24 months from the Uniontown mine.

Q. Those tonnages were not all delivered in 1957, were they? A. No, sir.

2972 Q. Or '58? A. The rail commitment was for 36 months and the river commitment was for 24 months.

Q. What were your spot contracts to the TVA, total spot contracts to the TVA in 1958? A. 198,000 tons.

Q. So the difference between 198,000 and the 1,094,000 would be the coal which you sold TVA on a term basis? A. Yes, sir, that is right.

Q. In 1959, your sales to the TVA were 1,336,870 tons and how much of that was on a spot order basis? A. 1959, spot order basis was 10,000 tons.

Q. And what percentage of the TVA market did that represent? A. Represented 7.5 per cent.

Q. Now, Mr. Hoffman, in these sales shown on Exhibit 168, the paper that we are looking at, where were these shipments of coal by your company, that is either West Kentucky or the Nashville Coal, Inc., after you acquired it, to what plants of the TVA were these shipments of coal? A. All of these shipments went to the Shawnee plant at Paducah, Kentucky, the Johnsonville plant at Johnsonville, Tennessee, and the Colbert plant at Colbert, Alabama. Colbert had no rail connection. They were entirely dependent on water movement of coal from western Kentucky.

2973 We made no deliveries of coal whatsoever to Widows Creek, either rail or water, none to John Sevier, none to Kingston.

Q. Pointing to your mines in west Kentucky, and I take it Uniontown is in this little circle, too? A. Yes.

Q. Can you see it all right from there? A. Yes, sir.

Q. Would you tell us the water distance from the Uniontown mine to the Shawnee plant? A. Yes, sir, I can give you that. I can give it to you to all these plants. The distance from Uniontown to Shawnee by water, statute miles, is 112. To Johnsonville is 129½ miles. Colbert, 337 miles. Widows Creek, 506 miles. Kingston, 663 miles.

Q. Now does your company, West Kentucky Coal Company, own its own barging equipment now? A. Yes, we do.

Q. And does it have any other mine from which it barges coal other than Uniontown? A. No, sir, no other one.

Q. Is it feasible for your company to barge coal from its Uniontown mine to Widows Creek or to Kingston? A. No, it is not.

Q. Would you explain why it is not feasible? A. Well,

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the Widows-Creek plant has a rail rate of \$1.55 from 2974 west Kentucky and it was a much lower rate from the Tennessee mines and also receives quantities of coal by truck from Tennessee mines. The Kingston plant has \$1.10 rate from the Tennessee mines and it is obvious—

Q. What Tennessee mines are you referring to when you say — A. I am talking about mines on the Southern Railroad.

Q. You mean the mines in east Tennessee? A. Yes.

Q. Are there any practical obstacles to your barging coal to these? A. Yes, there is in addition to that, it is impractical for us to proceed up the Tennessee River to Widows Creek or Kingston for the reason when we pass Wilson Lock we encounter small locks. They are 360 feet long by 60 feet wide. One of these barges is 195 by 35 by 12, and the vessel is 147 feet long, so you just can't do it.

Q. In other words, you just can't get them through the locks there in order to barge coal up to these plants, is that correct? A. That is right. We could get through there one barge at a time and take the boat through separately, but it would be an expensive operation. It is just not a practical operation.

2975 Q. Do you know what your rail rates are from west Kentucky over to the Kingston plant? A. Kingston plant?

Q. Yes. A. Yes, sir. It is \$3.20 a ton on the Illinois Central only. We have never shipped any coal there.

Q. Can you compete with mines in the area of east Tennessee with that rail rate? A. No, sir, impossible. You can't compete with a \$3.20 rate against a rate of \$1.10.

Q. What about your rate to John Sevier from west Kentucky? A. We have no rate to John Sevier.

Q. In other words, you can't — A. You can't get up thereby water and you can't get up there — it is above Knoxville, at Rogersville, Tennessee.

Q. What is your rail rate from your west Kentucky mines to Shawnee, Johnsville and the other steam plants in the

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western division? A. Our rate to Shawnee is 99 cents. The minimum rate to Johnsonville is through Grand Rivers, rail and barge movement, which we do not participate in. But the rail rate from west Kentucky mine to Grand Rivers is 94 cents. There is a 13 cents dumping charge at Grand

Rivers and a 16 cents barging rate, making a total of 2976 \$1.23 to Johnsonville. At Colbert, we have no rail rates and the movement there would be through Grand Rivers again, 94 cents. And there is a 13 cents dumping charge and 62 cents barging rate, \$1.69.

Q. Now are your mines competitive to those areas with those rail rates? A. Yes, we could move coal by rail on that basis.

Q. The Court asked you a few minutes ago of the mines you acquired from Nashville Coal Company. How many mines did you acquire? A. I think it was about five.

Q. How many mines did your company have before that? A. We had four.

Q. Were they all in this west Kentucky area? A. Yes, they were.

Q. Now have you had to close any of these mines during the '50's? A. Yes, we have.

Q. Would you explain which mines that you have closed and why you closed them? A. Well, we opened up a mine named Atkinson in 1952. It was closed in 1957. We were unable to sell the coal.

Q. What sort of an investment does that represent, 2977 opening a mine of the type of mine that Atkinson was? A. What investment?

Q. Yes. What does it cost to open a mine like that? A. Well, that mine cost about a million and a half dollars, but it was not thoroughly equipped. It had no washing plant. It had no dryers and only had a two track tippie.

A modern mine like Uniontown will cost you 7 million dollars, or a mine like Pleasantview, where it is fully equipped with five tracks, all modern equipment including washing plants and dryers. It is a different amount, depending

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on what you are trying to accomplish. In this particular case, that mine was opened up primarily to sell steam coal to public utilities and we had hoped that we could sell a substantial quantity of that coal to the TVA but we were unable to do so. After struggling with the mine for a few years, we closed it.

Q. All right, what other mines have you closed? A. Well, we closed the East Diamond in December 23, 1960. Closed Heckla mine —

Q. Why did you close your East Diamond mine? A. We closed the East Diamond mine because we worked out the No. 11. That is we didn't thoroughly work out the No. 11

— we still have some coal there, but it was not economical to continue on the No. 11 coal which is primarily a coal for stoker trade, domestic stoker trade.

2978 Why we closed it although we had tremendous
2979 acreage of Number Nine coal only eighty-eight feet beneath the Number 11. That mine was a modern mine, it was equipped with all the modern conveniences, including washing plant, but we were unable to interest anyone in buying the Number Nine coal.

Q. You mentioned one other mine, I believe, that you said you closed. A. Well, we closed the Heckla April the 10th, 1954.

Q. And what brought that about? A. Same thing. We worked out Number 11, were unable to sell the Number Nine.

Q. And now when you close a mine like that, I suppose you take the machinery out of it, do you not? A. Well, not in every case. Most of the time you do because you can't— for any protracted period, you can't hold a mine idle. It fills up with water, in west Kentucky at least, and to pump it out — we have a situation like that right now with a mine we call East Diamond, that I just mentioned. We could go down to the Number Nine coal there, and we are pump-

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ing that mine, but we figure it will cost us a million
2980 dollars to keep that mine pumped out to go down to
the Number Nine coal.

Q. If you don't do that though, can you go back to that mine at a later time? A. Yes. The question is whether it is more economical to continue pumping the mine intermittently or just abandon it and then sink a new shaft.

Q. Now have you — are you still in operation at the other mines that you had and acquired from Nashville? A. Yes, we are, with the exception of Kirk Mine and Stony Point. We closed the Kirk Mine July 31, 1959, and we closed Stony Point January the 8th, '57.

A mine called Pleasant View, which is one of the West Kentucky mines was closed February, 1959, and reopened October the 14th, '59, after we were successful in selling the TVA contract for 850,000 tons of coal a year for ten years. In that case we kept that mine on a stand-by basis.

Q. Now, Mr. Hoffman, have you prepared an exhibit showing the various bids that you made to the TVA from the Uniontown Mine on the TVA spot market? A. Yes, I have that.

Mr. Rayson: May we file this as our next exhibit, Your Honor?

The Court: Yes, sir.

2981 (Exhibit No. 169 was marked for identification and filed.)

Mr. Rayson: It may save time, Your Honor, if I stated what the exhibit shows.

Mr. Rayson: This exhibit shows each bid made from the West Kentucky Coal Company's Uniontown Mine, shown on the large yellow paper introduced by the Phillips Brothers Coal Company as an exhibit in their part of the case.

It shows each bid made, the amount of tonnage that was

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contemplated under the bid, whether or not an award was made.

In most instances, and where available, it shows the tonnage price at which West Kentucky submitted the bid, and then under TVA Plant Evaluation, it shows the figure at which the TVA evaluated West Kentucky Coal Company's bids as per million BTU's for the Colbert Steam Plant in many instances and for the Shawnee Plant in most 2982 instances.

By Mr. Rayson:

Q. Before going on with this, Mr. Hoffman, I would ask you when you bid coal from your Uniontown Mine to Shawnee, do you submit a delivered price bid? A. Yes, we do. We are a bulk carrier; we are not a common carrier, and we transport our own material.

Q. So you are interested then when you submit a bid from the Uniontown Mine in getting a contract which includes the cost of the transportation? In other words a contract which will enable you to use your transferring equipment? A. That's correct.

Q. Your barging equipment? A. That's correct.

Q. Now is the same thing true as far as the Colbert Plant is concerned? A. Yes, it is. Colbert cannot receive any rail coal from west Kentucky.

Q. Is there any advantage to the shipper such as you in shipping coal by barge rather than by rail? A. Well, only in this way. Uniontown mine has no rail connection. If you are going to sell coal from the Uniontown Mine, it would of necessity have to be water movement.

2983 Q. Well, apart from the Uniontown Mine, is it normally cheaper to barge coal than it is to transport coal by rail? A. Yes, it is.

Q. When you barge coal, is there a minimum amount of coal that you have got to barge in order to be economical in your barging costs? A. Well, yes, and again that primarily depends on the motor vessel. You can handle a smaller tonnage with a one thousand horsepower vessel

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where you can't do it with a 3,200 horsepower boat, and I might say our equipment, we have two 3,200 horsepower motor vessels, and one 5,400 horsepower, and the minimum tonnage we should handle with those vessels is twenty thousand tons.

Q. I take it that sometimes you have to do less than that?

A. Oh, yes, that's right.

Q. And sometimes you get more? A. That's right.

Q. You ship — you barge coal in flotillas of barges, a number of barges all hooked together? A. Yes. Yes, sir.

2984 Q. Mr. Hoffman, prior to February 28, 1957, had you submitted any bids to the TVA spot market from the Uniontown Mine? A. We did not.

Q. What was your sales activity from the Uniontown Mine at that time? A. Well, it was on term.

Q. And was one of your term contracts with the TVA? A. That's right.

Q. And did you have term contracts elsewhere? A. Yes, we had contracts elsewhere.

Q. Now would you explain just exactly what you did in connection with the first bid shown on page one of Exhibit 169? A. Well, on February 26th, we submitted a bid offering 12,500 tons of Uniontown coal at a price of \$4.75,
2985 delivered at Colbert.

Q. That is a delivered price? A. That's right.

Q. And the TVA evaluation was what? A. The TVA evaluation was .2180 per million BTU.

Q. Now were you awarded a contract on that — A. We were not.

Q. —bid? A. It was unsuccessful.

Q. Did you thereafter, on March 13, submit another bid? A. We did.

Q. Submit another bid in the same manner? A. Offered 12,500 at the same price, \$4.75, and the evaluation was .2180.

Q. Now, looking at Footnote B, the Footnote B to your

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bid of March 13, 1957, I note that the high successful bid on that occasion was evaluated by the TVA at .1837, roughly eighteen and a third cents per million BTU's. A. That's correct, yes, sir.

Mr. Rayson: I might say, Your Honor, that these figures shown in the footnotes, in fact all of the figures shown on this, are taken from the TVA bid award which have previously been introduced in evidence.

2986. By Mr. Rayson:

Q. Now, your bid was some nearly three cents per million BTU's higher than the high successful bid at that time? A. It was slightly over three cents.

Q. Yes. A. In money value, it equaled about eighty-five cents per ton of two thousand pounds.

Q. What does a cent per million BTU's, as a rule of thumb, represent to you in the terms of cents per ton? A. One cent per million BTU would be equal to twenty-five cents per ton in money.

Q. So in other words, your bid at that time was roughly eighty-five cents over the market, is that right? A. Over the successful bids, that's right.

Q. And I notice that you again on March 20th submitted a bid at the same price, that is \$4.75 a ton, that you were again unsuccessful? A. That is correct.

2987 Q. Did you thereafter reduce your price? A. I did. \$4.25.

Q. I notice that at that point the TVA evaluated price per million BTU was .1916. A. That is right.

Q. What was the high successful bid to the TVA on the occasion of that bid by West Kentucky Coal Company? A. That was on March 27th?

Q. Yes. A. The high successful bid was .1629.

The Court: Is that .1616?

Q. I believe it is .1829. A. .1829; that is right.

Q. And that would represent, according to your formula, roughly, about 40 cents over the market? A. Well, I figure about 32 cents.

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Q. And did you continue bidding at the \$4.25 price, Mr. Hoffman? A. Yes, I did.

Q. And how many more times did you continue at that price? A. Continued at that price up and including April 24th.

Q. And were you ever successful at that price? A. No.

Q. And did you thereafter again reduce your price
2988 on the TVA spot market? A. Yes, we did. We reduced the price to \$3.70 and the bid was evaluated at Shawnee.

Q. I notice that the evaluation of the bid at Shawnee at that price in the bid of September 4, 1957 where no tonnage figure is shown, was at the evaluation price, evaluated BTU price of .1675 and that it was also evaluated at Colbert at .1804. A. That is correct.

Q. Is that the same coal? Was the same coal evaluated in each of those? A. Yes. Here is the practice of TVA on these spot invitations. They send out an invitation the latter part of the month specifying that they will accept spot offers of coal each week not later than Thursday, and they have the privilege of evaluating any coal offered to any plant they see fit.

So consequently, they can either evaluate it at Colbert or at Shawnee.

Q. Now would the difference in the price between the evaluation at Shawnee and Colbert represent the greater distance that you would have had to barge that coal? A. That is correct; yes, sir.

Q. I notice that you were unsuccessful on your September 4, 1957, bid. A. That is correct. We were 13
2989 cents high.

Q. What was the situation at your Uniontown plant in September with reference to sales? A. On September 27 we submitted a bid for 18,000 tons at \$3.70 and we were the successful bidder. Our bid was the highest bid acceptable.

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Q. That was the September 27 bid? A. That is right.

Q. And had you submitted a bid at the same price before at which you were unsuccessful? A. That is right, on September 18th.

Q. So your first successful bid on this list of bids is September 27, and at that time, according to Footnote J, the bid of West Kentucky Coal Company was the highest bid which TVA accepted? A. That is correct.

Q. Now in September why was West Kentucky Coal Company interested in submitting bids to the TVA spot market? A. Well, the reason for it was that we had lost some tonnage, particularly movement of coal under the Nashville Coal Company contract that we had acquired. And also we had —

Q. Is that the TVA contract that you inherited from Nashville Coal that called for 350,000 tons a year? 2990 A. That is correct; yes, sir.

Q. And was that coal going from the Uniontown mine to Shawnee plant of the TVA? A. It was going to the Colbert plant.

Q. Anyway it was coming from your Uniontown mine? A. That is right. They had the privilege of taking it to either plant that they wanted.

Q. Do you recall just when that contract expired? A. I think it expired in June, 1957.

Q. Had you lost any other business at that mine in the late summer of 1957? A. Yes. We had lost some business. We had moved some coal through Mount Vernon, Indiana by barge and rail to Chicago in connection with the C.N.I. Railroad.

Q. Had you lost that order insofar as the barge coal was concerned at Uniontown? A. Yes, we had lost that.

Q. Was there any other business you had lost from the Uniontown mine about that time? A. I don't recall off-hand any business we lost other than the TVA and this movement through Mount Vernon.

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Q. Had you shipped any coal to the Tampa Electric Company during the summer of 1957 or spring of 1957? A.

Yes, we did. We shipped 118,000 tons.

2991. Q. Was that on a term contract or on a spot contract? A. That was spot contract.

Q. Were you in a position, or were you able to ship any more tonnage to Tampa in the fall of 1957? A. No, sir, we were unable to interest them in giving us an order.

Q. Had all the coal that you had shipped to Tampa come from your Uniontown mine? A. Yes, it was.

Q. And were these the reasons you were interested in bidding on the spot market of the TVA? A. Yes, sir.

Q. Why didn't you reduce your operation at the Uniontown mine or shut that mine down? A. Well, we did reduce the operation. That mine, when we acquired that mine, it was producing about 5,000 tons per day, and at this time it was producing 8,000 tons a day, so we did cut it back to three days a week.

Q. When did you do that? A. Well, along after we finished the movement of coal to TVA and to Tampa.

Q. You are referring to the TVA contract that expired in June? A. That is right.

2992. Q. All right. Following your successful bid in September at a price of \$3.70, what did you do on the spot market? A. We continued offering coal but were unsuccessful.

Q. And at what price did you continue to offer coal? A. At the same price, \$3.70 a ton.

The Court: Are all these prices on Exhibit 169, spot market?

Mr. Rayson: This entire Exhibit 169 is spot market bids which were successful and some of which were unsuccessful.

By Mr. Rayson:

Q. I notice that your first bid, after your successful bid of March 27, at \$3.70 was evaluated at .1668, and at that

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time am I correct in saying that the highest successful award was evaluated by TVA at .1641? A. That is correct.

Q. Now also in connection with that bid I notice that under "Tons" there is a figure "18-60,000". I wish you would explain what that means. A. Well, I had discovered that the TVA practice was to take the lowest price coal offered, and if the quota was completed and there was no room for the tonnage you offered then your bid was not accepted. Consequently, I give them a spread of 18 to 60,000 tons hoping we would get sixty but if they could not award that amount of tonnage they would at least award 18,000.

Q. All right. I notice then, without going through each one, that you continued the \$3.70 bid for three times unsuccessfully after your only successful bid prior to October 15, 1957. A. That is correct. In other words, I made twelve bids and eleven were unsuccessful and only one successful.

Q. Now then, on the first bid shown on page 2 of this exhibit, I note that you were awarded a spot contract for 18,000 tons again at the same price, \$3.70. A. Yes, sir.

Q. I note also at that time that your evaluated price was .1649, which was a somewhat more favorable price to TVA than was your previous bid at which you also used the \$3.70 figure. A. That is correct.

Q. Would you explain how the evaluated price to TVA was reduced? A. Well, the high successful bid was .1630.

Q. No, sir, I am referring to the first bid on page 2 of this exhibit. A. You are speaking about the one on 2994 October 25th?

Q. I am. A. Yes. That was evaluated at .1649.

Q. Why did the valuation of that bid change from .1668 to .1649 while your tonnage price remained the same? A. That was due to some change in the guaranteed analysis. You understand, that the money value here is merely a base. They compute your bid on the basis of heat value per million BTU for a cent. Consequently, if you change your

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guaranteed analysis that would reflect in your cost per million BTU.

Q. What would cause you to change the guaranteed analysis? A. Well, we take samples and run analyses ourselves every day on these coal mines, and if we note the analysis is improving then we step up the guarantee.

Q. Does the coal in your seams remain at a constant point as far as BTUs are concerned? A. No, they don't, that varies. You might be mining towards the crop and you might get into a wet room or two, and might get into what we call a horseback that would affect the quality of the coal.

Q. Now after that successful bid of October 25, 1957, I notice that you submitted two more bids at the same 1995 price on which you were unsuccessful? A. That is correct.

Q. So that in connection with the second of those bids, that is the bid of November 6th, 1957, your evaluated price was .1649 while the TVA evaluated price was .1630. A. That is correct.

Q. Now following those bids I note that you submitted two more bids again at the \$3.70 price at which you were successful. A. Yes, sir.

Q. Now in connection with the first of those, I will ask you if your bid, that is the bid of November 15th, was the highest successful bid awarded by TVA at that time? A. It was.

Q. And I will ask you in connection with the second of those successful bids, that is the one of November 22, 1957, if there were other bids at Shawnee plant for less than yours? A. Yes, there were. We were the highest bidder.

Q. After those two successful bids I note that on November 26 and December 4, you again submitted a bid at the same price, \$3.70 a ton, in which you were unsuccessful? A. That is correct.

Q. I note further that at that time that the evaluated price of your bid was .1649, where as the high successful bidders were at .1626 and .1616 for the 2996

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two respective bids. A. That is so; yes, sir.

Q. Now I note on your bid of December 20, 1957
2997 that you reduced your price to \$3.62. Would you explain why and how you arrived at that reduction of price? A. Well, I noticed under my bid of 12-4 where I was unsuccessful, that was eight cents a tons higher, so consequently on the next bid I made I reduced my price eight cents.

Q. In other words, you followed the market to what it had been on the previous successful bid of some other company? A. That is correct.

Q. Now after bidding successfully at \$3.62, did you again bid at \$3.62? A. Yes, I did.

Q. And were you successful? A. No.

Q. At that time I note that your bid was evaluated at .1616 and the highest bid was under you at .1610? A. That is correct.

Q. Now then, I note that on January 1, 1958 you reduced your price to \$3.58. Would you explain how you arrived at that reduction in price and why? A. Same formula.

When I was unsuccessful on the previous bid and I
2998 got a listing of the awards, I concluded I would have to reduce the price .4 cents if I expected to get an award.

Q. Were you undertaking to find term contracts for the Uniontown mine during all of this period? A. Oh, yes, that is what we were trying to do.

Q. Were you interested in continuing on the TVA spot market? A. No, just a case of necessity.

Q. All right, after bidding successfully at \$3.58, I notice that you twice again bid at \$3.58 and on each occasion you were unsuccessful? A. That is so.

Q. And then on January 29 you reduced your price to \$3.55 and that you were still unsuccessful? A. Yes, sir, that is so.

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Q. And on the occasion of that bid, that is your January 29, 1958 bid, I notice that your evaluated price is .1586, whereas the highest successful bid was .1515. A. I believe it was .1555.

Q. .1155. A. Yes, sir.

Q. Does that represent about 10 to 15 cents below your —
A. Yes, it would. Yes.

2999 Q. Your price per ton? A. That is correct.

Q. And then I notice you submitted two bids from Shawnee in February at \$4 per ton at which you were unsuccessful and that you returned to your previous bid of \$3.55 on March 12, 1958 and that you were again unsuccessful? A. That is correct.

Q. Did you then discontinue any bidding operations from the Uniontown mine on the TVA spot market? A. I did.

Q. And why did you discontinue bidding operations at that time? A. Because I felt it was a situation where it did not produce results and I was endeavoring to obtain a term contract.

Q. Did your production decrease at the Uniontown mine following this — A. Yes, it did.

Q. Withdrawal from this market? A. Yes, it did.

Q. Have you prepared a list of your barge loadings at Uniontown for 1958? A. Yes, sir, I have that here.

Mr. Rayson: May we introduce this as our next 3000 exhibit.

(Exhibit No. 170 was marked for identification and filed.)

By Mr. Rayson:

Q. Was January of 1958 the last month in which you shipped coal to the TVA on the spot market? A. That is correct.

Q. Do these figures indicate the reduced level of your activity at the Uniontown mine following this? A. They do.

Q. I notice that your barge shipments or barge loadings go up in the latter part of the year. Could you explain why

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they did? A. I was successful in obtaining a term contract from the TVA.

Q. Mr. Hoffman, in connection with any of these bids on the TVA spot market, was it your intention to depress in any manner the price of that market? A. No, sir.

Q. What was your intention in bidding on that coal? A. My intention was to relieve the situation at our Uniontown mine as far as possible until such time as I could obtain a term contract.

Q. Were these bids of the West Kentucky Coal Company at the Uniontown mine your responsibility? Were
3001 you the one that formulated them? A. That is right.

Q. Did you confer with your other officers of the company? A. Oh, occasionally we conferred about it. On spot movement it was a case of trying to relieve the situation at the mine.

Q. Did you bid this coal on the TVA market pursuant to an agreement with any other company? A. None whatever.

Q. Did you do so pursuant to any agreement with the United Mine Workers of America? A. No — never talked to any of them.

Q. Did you do so pursuant to any instructions from Cyrus Eaton? A. No. Never talked to him about selling coal at all.

Q. Did you do so with the intention of harming coal operators in east Tennessee? A. No, sir.

Q. What is the type of coal that is produced in the Uniontown mine? Is it the resultant coal or just a mine run coal?

A. It is mine run coal. It can be crushed and it has a washing plant.

3002 Q. What about your other mines that sold to the TVA, what sort of coal do they produce? A. That would be resultant coal.

Q. Would you explain to us just what that term means? A. Well, a resultant coal would be what is left after preparing a special size product. As an example, we were running stoker sizes for the domestic trade, and we would have

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left an inch or a one-quarter inch by zero unwashed, or we might have a one-eighth by ~~35~~ mesh washed, which we call in the trade carbon. There is no place to sell that coal, except to some large steam user.

Q. Is this resultant coal a by-product of your regular products of your other mines? A. It is resultant from the mine run, yes.

Q. You say there isn't a large market for that sort of coal? A. None whatever. We usually sell some of it to the cement plants, but practically all of them are on gas.

Q. What can you do with this coal, if you don't sell it?

A. Well, the only thing we can do would be to throw it away.

Q. Can you keep it? A. No, you can't.

3003 Q. What is the problem there? A. Well, it deteriorates and it is expensive to put in on the ground and recover it. If you load it in the car — we work under a 25 per cent car rating, and you would have to sell it or move the car before you could get empty cars to run the mine again. I might explain this. That a coal mine is different from a manufacturing plant. After you make a run of coal, if you have got 100 or 150 cars, you have got to sell it.

Q. Will the railroad give you any more cars if you don't move the ones you have already loaded? A. Only complement to what portion you have given your no-bills, which makes an impossible situation, because you can't run a coal mine for three or four hours. You have got to make a complete eight hour run. If you can't get enough empty cars to make a run, you just have to put the mine down until you sell the coal.

Q. Why can't you run a mine for three or four hours? A. Your cost would be prohibitive.

Q. What were the other mines that you operated during this period from which you sold coal on the TVA spot market? A. Well, from East Diamond, Pleasantview, Sham-

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rock, Crescent.

3004 Q. Did all of these mines produce the resultant coals of which you have spoken? A. Yes, they do.

Q. Could you tell us what other markets you had for the resultant coal? A. We had practically no other market for it. Some rather large steam plants won't pay freight on it. There have been conditions where we had to throw it away.

Q. In connection with any of those bids from their other mines, your mines, other than Uniontown, did you enter those bids pursuant to any agreement with any other companies, or with the purpose of depressing the TVA market?

A. No, sir, I never talked to any other company about any bid we made to the TVA.

Q. Did you do so pursuant to any agreement or understanding with the United Mine Workers? A. None.

Q. Did you do so with the purpose in mind of harming coal companies in east Tennessee? A. No, sir.

Q. You think your bids had serious effect on the spot market? A. Yes, sir.

Q. I say do you think that your bids had an effect on the price of the spot market? A. No, sir. I think the
3005 offers from other coal companies had an effect on my bid. I think the record shows it.

Q. How would you explain that? What do you mean by that? A. I mean I was unsuccessful here more than I was successful and someone else made a lower price than I made.

Q. Were you leading the market or were you following it? A. I was following it.

Mr. Rayson: Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Hoffman, I notice in Exhibit 69, annual statement of West Kentucky for 1958, the name of Robert H. Bowden listed as vice president in charge of sales, under his name appears Thomas J. Hoffman, vice president. Was Mr. Bow-

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den vice president in charge of sales? A. He was vice president in charge of sales, but I have always handled the TVA account ever since I was sales manager. I was delegated for other duties in traffic and marine and he was made sales manager.

Q. He was in overall charge of sales operations? A. I didn't handle the sales, no, sir.

3006 Q. I mean Mr. Bowden was in charge of sales. A. He was in charge of sales, yes, sir, other than this TVA. I handled the TVA.

Q. Well, did you have an operating head with respect to sales that had final authority with respect to policy on sales? A. Oh, we talked about sales of all description, but ever since the original sale was made to TVA, I have handled the account.

3007 Q. I see, and of course you would have to consult with Mr. Bowden about the policy with respect to sales to TVA? A. No.

Q. You wouldn't have to? A. I wouldn't have to consult anyone.

Q. Well, of course, the sales to TVA had to be fitted in with the overall sales operation of the company, did they not? A. That's correct. I knew the situation. On these long-term contracts, we would talk about the possibility of making a bid. I usually said what I thought should be done, and filed a bid.

We conferred with Mr. Moss Patterson, the operating vice-president. We wanted to know what the costs would be, what we might expect, but as far as filing the bid, as far as handling the TVA account, I did it.

Q. But you couldn't have two sales departments for the same company? A. Oh, yes, you could have a half dozen.

Q. I mean without coordination between the departments. A. Oh, we coordinate all activities of the company.

Q. Otherwise, you both might sell the same coal at the

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3008 same time, and you would be stuck with one extra contract, is that right? A. Well, we try to avoid conflict, if that is what you are talking about.

Q. Yes, sir, and you had conferences? A. But Mr. Bowden knew that I was handling this account, and we didn't have any conflict.

Q. And if there was coal available for TVA, you would handle the sale of it? A. That's right.

Q. But it would not come into your hands until after Mr. Bowden decided that it would go to TVA? A. Mr. Bowden signed what?

Q. Coal would not be allocated to you for sale to TVA until Mr. Bowden decided — A. That is correct.

Q. — that it was available for sale to TVA. A. No, I knew what was available. If it was convenient, we talked about it, specially on a long-term. Now as far as spot sales are concerned, why we did not consider that necessary to confer with each other.

If we were going to make a ten-year bid, then we would talk about it. We would talk with our operating department, our financial department, and all, but I was the man who made the recommendation and said what price we would bid.

3009 Q. Now, Mr. Bowden would be in charge of contracts with respect to other markets besides TVA?

A. Yes, yes, other markets, yes.

Q. And West Kentucky did have a number of other markets? A. Oh, yes, we had a number of other markets.

Q. And I believe your annual statement says that you have —

Mr. Rayson: What are you reading from?

Mr. Rowntree: This is Exhibit 58.

Mr. Rowntree: Exhibit 69, I'm sorry.

Q. "West Kentucky has built up an impressive and diversified roster of customers which now includes leading

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midwestern electric utilities, chemical, cement, and other industrial users, and important Canadian clientele, and a strong group of commercial and domestic markets in the Great Lakes Area as well as the South."

That is an accurate statement of your markets and 3010 your customers? A. That's right. We distribute coal in seventeen states. I think I testified to that earlier.

Q. Yes, sir. A. Including Canada.

Q. And is it not true that West Kentucky Coal Company was responsible for inaugurating the reduced rail rate from the West Kentucky field to the Widow's Creek plant of TVA? A. No, sir, I wouldn't say that that is true. I talked to the TVA and some officials of the L&N Railroad, but at such conference which occurred one time, the only purpose I served was to indicate whether or not we were in position to load one hundred cars of coal in an eight hour shift, and of course we were able to do it, and I said so, on volume movement.

Q. Well, isn't it true that West Kentucky, particularly Mr. Eastin, wanted to claim credit for the reduced freight rate? A. Well, of course, naturally the lower freight rate, the more opportunity you have to sell coal, but you understand anyone else now, that wasn't confined to West Kentucky Coal Company.

Q. Oh, no. A. That was available to any mine in the west Kentucky coal field.

3011 Q. And did you not submit some bids or one or more bids to the TVA with a view to obtaining term contract for the Widow's Creek Plant before the last term bid opening? A. We never submitted —

Mr. Kramer: Wait just a moment. Your Honor, this is in 1959, and we have of course objections to that type of testimony, and —

The Court: Overrule.

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The Witness: No, sir, we did not. We do not confine any bid to any plant.

By Mr. Rowntree:

Q. Is it not true that you can sell coal competitively to the Widow's Creek Plant with the reduced rail rate? A.

Never have sold any coal to the Widow's Creek Plant, 3012 water or rail.

Q. Cannot you submit now a competitive bid on the Widow's Creek Plant? A. No, sir, we never did supply coal to Widow's Creek Plant. We merely filed a bid to TVA for a certain quantity of coal, and they can take that coal to Shawnee Plant, Johnsonville Plant, or Widow's Creek. We can't get into Colbert because the Southern Railroad serves that plant, and so far, they haven't been willing to make connections with the L&N Railroad, but we do not confine the bid to any particular market. We have never sold any coal in there.

Q. What was the statement about connections with the L&N Railroad? I didn't get that. A. At Colbert, they have no connection. We can't get in there with rail coal.

Q. Yes, sir. A. From West Kentucky Coal Company.

Q. That has nothing to with Widow's Creek? A. With Widow's Creek, I can only tell you this, sir. That we have never sold any coal to Widow's Creek plant.

Q. Yes, sir, but you now have a competitive position whereby you very well may sell coal to Widow's Creek by reason of the recent rail reductions? A. There is 3013 a possibility that the TVA may take some coal from the west Kentucky coal fields to the Widow's Creek.

Q. And you have — A. But all I can tell you is we have never supplied any coal to Widow's Creek.

Q. I see. A. I might tell you this, too, sir, I'm sure you are familiar with it, that the Tennessee mines have a \$.65 rate into Widow's Creek, and in one case on the TC, they have a \$.60 rate, and the best rate on this volume you are talking about to the west Kentucky coal field is \$1.55.

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Q. And you are — A. And we have got \$.95 a ton to start with.

Q. And it costs these mines in Tennessee a good deal more to mine their coal than West Kentucky, is that right?

A. Cost more to produce coal?

Q. These mines in Tennessee that you mentioned? A. I don't know anything about their costs.

Q. These mines are located immediately north of the Plant there near Chattanooga, the Tennessee mines which you were talking about? A. Yes, Tennessee mines around Whitwell, and Palmer and back in there, and as I 3014 said before, you know there is a tremendous quantity of coal moved into Widow's Creek by truck.

Q. Yes, sir. A. Every time I have been around there, there was a procession there a half mile long.

Q. Now, Mr. Hoffman, turning to this three-page exhibit? A. Yes, sir.

Q. 169. Can you tell me again when your TVA contract with Uniontown Mine expired in 1957? A. It expired about June, I think, sir.

Q. And how much coal per month was shipped on that contract? A. Well, it was, if I recall, it was 1,500,000 tons for three years, be a little some — oh, about somewhere in the neighborhood of 30,000 tons a month.

Q. Now, is it not true that West Kentucky and Nashville were committed to ship Uniontown coal to Tampa, Florida, on a 1955 contract, the shipments to commence in the summer of 1957? A. You speaking about a contract that was negotiated by Nashville Coal Company?

Q. Yes, sir. A. And which was later taken over by West Kentucky Coal Company. We made no shipments 3015 under that contract.

Q. Do you know of your own knowledge — let me ask this. Did you make the decision not to ship that coal? A. No, I did not make that decision.

Q. And by reason of the decision not to ship that coal, that coal was then available to put upon the TVA spot mar-

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ket? A. No, sir, we made an effort to interest the Tampa Electric in taking coal from the mine until we could work out our differences, but we were unsuccessful in doing so. The coal was available to any buyer that could use it. It wasn't entirely a TVA proposition.

Q. Yes, sir. And this Tampa contract was a substantially large contract over a term of years, which West Kentucky and Nashville already had available at that time, is that not right? A. There was a contract with Tampa Electric that was negotiated by Nashville Coal Company before we acquired the property, and on legal advice we did not make any deliveries under the contract.

Q. Just a moment, Mr. Hoffman. Did you consult with the lawyers?

Mr. Kramer: Just a moment, Your Honor, we did not go into the Tampa contract at all by this witness. It is a new field. Of course, he can make him his witness, 3016 but I think we should call it to Your Honor's attention.

The Court: He does make him his witness on this contract.

Mr. Kramer: We did not touch it. But you can ask him about it.

Mr. Rowntree: Yes, sir.

3017 Q. Mr. Hoffman, will you state whether or not you, yourself, consulted with legal counsel with respect to that Tampa contract? A. I talked to some of our attorneys, but I don't know that at that time any decision was reached. I did not handle — I did call on Mr. MacInnes of the Tampa Electric two or three times in respect to the contract and attempted to work it out.

Q. What do you mean "work it out", if I may inquire?
A. What did you say?

Q. May I ask what you mean by "work it out"? A. Well, there were some aspects to it that we thought was not good practice. For instance, it was a wholly supply contract and we thought that maybe we could adjust our differences.

Q. What differences did you have with Tampa Electric Company? A. Well, it was a contract which was a violation of the Sherman Anti-trust law. We did not want to be involved in it. That is the whole answer to that.

Q. Was anybody questioning the legality of the contract besides West Kentucky? A. I understand there was. They did not question it with me.

3018 Q. Did you hear anyone complain about the legality of it? A. I heard that there was complaints about it, yes.

Q. Without regard to hearsay, did you hear anybody complain about it? A. No one complained to me about it, no.

Q. Was that old contract a low priced contract? A. Well, it was a fairly low price; yes, sir.

Q. Was one of your differences the fact that you wanted a higher price or not? A. No, that was not the primary purpose of the situation at all. We offered spot coal and made deliveries of 118,000 tons of coal hoping that we could adjust any differences in the contract.

Q. And what did you sell that spot coal for, delivered? A. Well, now I would have to quote figures from memory. The price was \$3.75 per ton f.o.b. barges Uniontown. We did not arrange the transportation, or the transfer, or the unloading at Tampa. That was done by the Blue Stack Towing Company.

Q. How much did it cost you, transportation? A. Well, I think the transportation was \$3.65 a ton.

3019 Q. And the price under the old contract was \$6.85 delivered? A. That is about right; yes, sir.

Q. And so the net price after transportation under the old contract would have been \$3.09 per ton. A. You mean f.o.b. mine?

Q. Yes, that is right. A. If you reflected it back?

Of course, I might explain this, that we did not expect to continue paying any such transportation charge as was involved in that original movement. We did not expect to

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reduce the mine price. We expected to reduce the transportation cost.

Q. And will you state whether or not that was one of the things that you were bargaining with Tampa about when you decided not to ship the coal to Tampa? A. No, no, we did not. That was not discussed.

Q. The result was, Mr. Hoffman, wasn't it, that this coal was available then to put upon the TVA spot market? A. It was available for term contract. That is all we were trying to do, was sell it somewhere on a legal basis. You can't sell coal from a mine like Uniontown on the spot market.

Q. Well, of course, you can try to. A. Well, it 3020 isn't a practical situation. You can't sell coal from day to day, not with a mine —

Q. Because of the extraordinarily large tonnage involved? A. Well, it is just an impractical situation. That isn't the way it is done.

Q. And the spot market is not big enough to absorb that kind of tonnage, is it? A. That is correct in a way, because these mines nowadays will run 8,000 tons of coal a day in west Kentucky, and I think we can all understand that would be pretty difficult to move that on a day-to-day basis.

Q. And a 10,000 ton order is extraordinarily large on the spot market? A. Would you read that question please?

(The question was read by the reporter.)

A. No. That is a very small order because you wouldn't ship all that one day. If I get an order for 10,000 tons of TVA on a spot order that is for a 30-day shipment.

Q. I am talking about the normal run of spot bids on the TVA spot market. A. No, I wouldn't say 10,000 tons is a large order.

Q. Do you know any other operating company that 3021 put bids in repeatedly for 10,000 tons? A. Many operating companies?

Q. Yes, sir. A. Lots of them.

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Q. Who? A. Well, Illinois. We compete with the big mines in Illinois. They have the same freight rate we have to Shawnee plant at Paducah. We compete with all of the large mines of Illinois, some of them even larger than our property.

Q. Can you name some specific companies that — operating company — that did put repeated spot bids on the TVA spot market of 10,000 tons or over? A. Oh, yes. Some of those big Illinois operations. You know who they are.

Q. Well, I am sorry, Mr. Hoffman, I don't. If you could recall. A. Well, it is a matter of record over in the TVA office.

Q. Mr. Hoffman, did you have anything to do with the negotiation of the Memphis generating plant contract with Peabody Coal Company? A. No.

Q. Has Mr. Bowden done any work in the way of selling TVA term coal for West Kentucky? A. No, sir.

3022 Q. Do you know if he has taken any trip or attended any meeting with respect to term contracts on TVA coal? A. No, sir, I don't know anything about any such trips. I can tell you this, that I had nothing to do with them, any trip he might make, whether he goes to Milwaukee or Minneapolis in pursuit of his regular duties, but I can tell you positively as far as this TVA is concerned no one told me any price to submit either on spot or term. That is definite.

3023

ALBERT PASS

a witness on behalf of the cross defendant.

DIRECT EXAMINATION

By Mr. Combs:

Q. Your name is Albert Pass? A. Yes, sir.

Q. You have testified here before in this case, have you not? A. Yes, sir.

Q. Mr. Pass, I ask you if sometime in the spring of 1955

Testimony of Albert Pass

you attended a meeting in a union hall in or near Jellico, Tennessee at which meeting there was present Ed Daniel and Taylor Maddox and whether or not that you said in substance at that meeting that coal was being sold for \$2 a ton and said, "You men know that has got to be stopped"; and you said, "And it don't make no difference what it takes to stop it, either"; and then you said, "If any of you men get into any trouble stopping it, all you have to do to see me is look back and I'll be there."

Did you attend such a meeting and did you make such statement? A. I have attended several meetings in 3024 and around Jellico since I have been a representative of the United Mine Workers of America. I have never made such statements at a meeting at Jellico or any other meeting that I have attended, nor have I made such statements to any individual people.

Q. Did you attend any such meeting in April of 1955? Do you recall attending a meeting of any kind in Jellico? A. No, sir, I don't.

Q. You have never made statements of that character at any meeting at any time? A. No, sir.

Q. Mr. Pass, I believe that you have testified here before that you are the secretary-treasurer of District 19? A. Yes, sir.

Q. Now as secretary-treasurer, do you have control and have in your charge the contracts that are negotiated on behalf of District 19, United Mine Workers? A. Yes, sir.

Q. Were those contracts in your office as of 1950? A. Yes, sir.

Q. Could you estimate approximately how many 3025 contracts percentage wise that you had in the State of Tennessee? A. Percentage wise? I don't understand.

Q. Percentage wise of the total number of mines in Tennessee, what per cent of them did you have under contract

Testimony of Albert Pass

at that time? A. I would say percentage wise there would be 75 to 80 per cent of the companies under contract.

Q. That was in 1950? A. Yes, sir.

Q. And '49? A. Yes, sir.

Q. Now in 1958 what percentage of the total number of mines in Tennessee would you estimate you had under contract? A. I would say it would be practically the same.

Q. Was that consistent during the time of 1950 up through 1958? Did you have fairly consistently the same percentage? A. The various amendments that were executed to the 1950 contract, I would say would be about the same percentage, yes, sir.

Q. Are you familiar with the Meadowcreek mine that was purchased by the Clinchfield Coal Company? A. Yes.

Q. Do you recall about when that mine was purchased? A. I believe it was some time around 1950. I am not positive of the date.

Q. Now at the time the Clinchfield Coal Company acquired this mine, was there a union contract with this company, with the company that owned the mine that sold it to Clinchfield? A. Yes, the Tennessee Coal Company was under contract with the United Mine Workers at the time that Clinchfield acquired the mine.

Q. And as of 1958 that mine was under contract with the United Mine Workers? A. Yes, sir.

Q. Mr. Pass, did you know about the Pocahontas Fuel Company taking over the Trimore and Moore coal mines? A. Yes, I do.

Q. Were those mines under contract with United Mine Workers at the time the Pocahontas acquired them? A. Yes, they were.

Q. Are they under contract now? A. One of them has worked out. That is the Moore Coal Company mine. It is worked out, of course, and was under contract up until they worked out the coal. The Trimore mine is still operating and it is under contract with United Mine Workers.

Testimony of Albert Pass

Q. Now, Mr. Pass, at the time you testified here
3027 before you were asked some questions by counsel as
to unemployment in the coal fields in the area of Dis-
trict 19 and Kentucky and Tennessee. I ask you, Mr. Pass,
what the union has done or what is it trying to do to assist
the unemployed members of the union and others unem-
ployed? A. Well, we have urged, in particular we have
urged the members of Congress to adopt some kind of so-
lution to this terrible problem of unemployment, and par-
ticularly the depressed areas, of which, of course, Kentucky
and Tennessee happen to be one. In fact, we attended a
meeting in Charleston, West Virginia some few months
ago, which was known as the Kennedy Conference, which
was participated in by a large number of persons and as a
result of that meeting other committees were created, and
through the insistence of the United Mine Workers of
America and the other people who participated, Congress
did adopt legislation to provide certain benefits for these
people who lived in the distressed areas. Of course, the
bill was signed by President Kennedy.

Q. Is that what is known as the Aid to Depressed Areas
Bill? A. Yes.

Q. Has the United Mine Workers in District 19 partici-
pated in committees that were set up or business groups to
try to attract industry into these areas? Have you
3028 participated in that? A. Yes. Of course, all of the
districts in Kentucky and District 19 met with the
officials of the State of Kentucky in an effort to try to ob-
tain some means for the people who are distressed and who
are in need, and in addition to that, why we have contacted
the officials in the state capital at Nashville in an effort to
try to get all of the assistance that we could from them.
In fact, we have talked to everybody that would listen to
our plea that we thought that could help in the sit-
3029 uation.

Q. Has United Mine Workers taken the position
with reference to tax reform in Congress in order to try to

Testimony of Albert Pass

put the coal industry on a more competitive basis with petroleum such as depletion tax and have they participated in that? A. Yes, we have. We feel that the coal industry is not on the same competitive basis as are other fuels of the nation, particularly oil and natural gas.

Now the oil industry has a depletion allowance as I understand of some two to three times more than does the coal industry. That of course enables the oil industry to obtain or be able to do more research work, more development, and more expansion of their business. Whereas, by reason of the fact that the coal industry is not treated in the same manner, they don't receive such consideration.

We have urged Congress, and we still are, and will continue to adopt some measures that will place these fuels on the same competitive basis.

Q. That is tax wise? A. Yes.

Q. Now, Mr. Pass, has the United Mine Workers participated in the programs to secure surplus commodities to these distressed areas? A. Yes. In fact, I was assigned by the president of the district, District 19, to help the county courts in Kentucky first, of course, because that is where it was received first, to institute the program
3030 as far as the United Mine Workers could be beneficial, and of course the county courts control it.

We did have meetings with them; we did set up the program; and we did of course obtain food for all the people who were unemployed and who were distressed.

The state of Tennessee, I have met on two or three occasions with a gentleman by the name of Mr. Gilliam.— I can't recall his first name — who is in charge of the program, and of course as the program progressed, at first they only had cheese and some powdered milk, some beef and gravy, and that was about the limit at the start.

As it progressed, we began to urge that they include and add more items to the program so that the people who were receiving them could receive a more balanced diet, and in

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particular, we urged that they try to obtain, if possible, meal and flour and beans and potatoes and meat. We have been instrumental in some instances in obtaining some of those items, but as of yet, we don't have them all.

Q. Now, Mr. Pass, just briefly, have you, has the United Mine Workers participated in trying to get increased unemployment benefits and better coverage both federal and state for the unemployed in general, have they participated in that program? A. Yes, we have on both federal and state levels.

3031 Q. Tennessee and Kentucky? A. Tennessee and Kentucky.

CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Pass — A. Yes, sir.

Q. You spoke of the Meadow Creek Mine being under contract at the time — at what time? A. That was at the time that the Clinchfield Coal Company obtained the mine.

Q. And was that around 1950 or — A. I can't recall the exact date. It's been sometime ago. It could have been '52 or '50 or '49. I really don't remember the date on it.

Q. Is it not true that that mine was brought under contract by way of secondary boycott?

Mr. Rayson: Now, Your Honor, we object to this question, and it is highly improper and immaterial.

3032 The Court: I overrule it. You went into it.

Mr. Rayson: Your Honor, we —

The Court: You went into it, and I overrule it.

By Mr. Robertson:

Q. Mr. Pass, I ask you —

The Court: You can't go into a subject just half way. When you go into it, that enables the other side to go into it.

By Mr. Robertson:

Q. Mr. Pass, I ask you if the contract of which you speak was obtained by way of a secondary boycott, adjudicated by the United States Court of Appeals in the 6th Circuit,

Testimony of Albert Pass

and that the United Mine Workers have paid a judgment to that company in damages in the amount of four hundred thousand dollars?

Mr. Combs: Now, Your Honor, we object to that question. I asked the witness this question, whether or not —

The Court: I will let you go into the secondary boycott. You can't go into any alleged judgment. I will let you ask him if they lined up, under what circumstances it was lined up.

Mr. Robertson: Yes, sir.

By Mr. Robertson:

Q. Is it true that this contract has been adjudicated, 3033 that this contract was signed by way of a secondary boycott being imposed by the United Mine Workers against this company?

Mr. Combs: We object to the form of the question. I don't think the witness is expected to know what a secondary boycott is. It's a legal question.

The Court: Well, I don't know. He may answer if he knows.

By Mr. Robertson:

Q. Do you know the answer? A. Well, I know this about it. I know that the Tennessee Coal Company executed a contract and operated under that contract, and I know that the Clinchfield Coal Corporation executed a contract and are still under contract as my records show.

Q. But you don't know about this case to which I refer?
A. I didn't participate in the case you refer to.

* * * * *

REDIRECT EXAMINATION

By Mr. Combs:

Q. In connection with this question, Mr. Pass, how 3034 long after the Meadow Creek Coal Company signed a contract before it was acquired by the Clinchfield Coal Company? How long a time did they operate under

Testimony of Mark E. Eastin

Mine Workers contract before Clinchfield acquired that mine? A. Well, it was a considerable period of time, but the dates I can't recall, but I would say it was some years, but I can't remember the time.

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3035

MARK E. EASTIN

called as a witness by and on behalf of the cross-defendant,

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DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Mr. Mark L. Eastin, is it not? A. Mark E.

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Q. Mr. Eastin, where do you live? A. Madisonville, Kentucky.

Q. What is your occupation? A. I am president of the West Kentucky Coal Company.

Q. How long have you been president of the West
3036 Kentucky Coal Company? A. I was elected president, March 16th, 1956.

Q. Before going into your work what was your educational background? A. I graduated from Vanderbilt University.

(Remarks of the Court off the record.)

Q. Mr. Eastin, how long have you been connected with West Kentucky Coal Company? A. Well, actually all my working life. I worked in the summer vacations between high school years in the preparation plant, with the engineers in the coal mines, and when I went away to school. After I graduated I went back to work for the company and have worked for them ever since.

Q. Will you trace briefly your history in the company from the time you went to work for them after you graduated from Vanderbilt up to the present time. A. Well, I first went to work in the invoicing department. That was in '29. And then proceeded through the retail accounts re-

Testimony of Mark E. Eastin

ceivables desk, the wholesale accounts receivables desk. I was transferred to Louisville where I was put in charge of the retail agency and wholesale agency there, and I was sent back to Paducah where our general sales office was and was made assistant to the sales manager, and assistant to the vice-president of sales, and I was transferred to Erlington, Kentucky, and in charge of the St. Bernard division of the company. And then I was made assistant sales
3037 manager of the company, West Kentucky Coal Company, then assistant to the president, vice-president, executive vice-president, and then president.

Q. Mr. Eastin, is the West Kentucky Coal Company a producer of coal and also handles its own sales? A. That is correct.

Q. What is the history of West Kentucky Coal Company? How long has it been in existence? A. Well, it dates back to 1904 and '5 when the North American Company, which was a utility holding company in the East, started up a coal field to go on the Ohio River in Union County and for the purpose of having reserves for the Union Electric Company, which was a utility in St. Louis, and from there on the reserves were enlarged and the company increased in size.

Q. What is the area from which West Kentucky gets its production? In other words, where does it operate? A. All in western Kentucky, and at the present time we are operating in Hopkins County and Muhlenberg County. We own some property in Webster County and have also operated in Union County.

Those counties all lie adjoining each other. They lie close together.

Q. In its production field does West Kentucky produce mostly in the field of underground mining or in strip
3038 mining? A. Yes, we have been principally underground miners since the inception of the company. In fact, we have never done any actual stripping on

Testimony of Mark E. Eastin

own. We have had some coal stripped on our properties by others for us.

Q. Do you lease any of your coal lands to anybody for production purposes? A. Yes. We have from time to time had leases with various companies down there. Particularly with respect to our strip acreage because we are not strippers, and we have had people who have the equipment and the know-how in the stripping industry to do that stripping for us.

We have also leased some small underground areas to other underground operators. We have at present one small lease with Hatfield-McCoy Coal Company, which is an underground operator.

We have at the present time some coal leased to Pond River Collieries which is owned by Peabody. That is strip coal.

We have an acreage of coal leased to the Ruby Chandler Jordon Company, which is a strip operator near Madisonville. We have some coal leased to the Badgett Mining and Stripping Company near Providence which is also strip coal.

Q. You mentioned a moment ago that you had some 3039 lands leased to Peabody upon which they were conducting a stripping operation. How long—how far back have you leased coal lands, or a portion of your lands, to Peabody? A. Since the early '40s. They have stripped in two or three, or three or four, different areas on our properties.

We entered into one big lease in particular with them in which—at that time they were the Sinclair Coal Company of Kansas City, and, of course, that company was merged into Peabody. That goes back to the early '40s when the Homestead mine was developed on our property. We sold the coal. In fact, we helped in some respects to put the mine in but it was their mine and they operated it on our property.

Q. Did you get the coal from their operation or did they sell the coal themselves? A. We sold the coal.

Testimony of Mark E. Eastin

Q. Now in the coal that is being produced now on this contract, the lease you have with Peabody, what about the sale of the coal? A: We have the option of selling the coal. Frankly, the coal business has been such of late that we are selling part of it. We haven't needed the tonnage. And consequently, under our lease with them, they have a right, if we do not sell the coal, to either sell it themselves or
3040 let someone else sell it in order to operate the mine, and at the present time they are selling most of the coal from that mine because we don't have the business to keep the mine running.

Q. Is that lease with Peabody similar to the leases you have with the other companies that are operating, in the main? A. Very similar; yes, sir.

Q. Are the mines of West Kentucky mechanized mines? A. Yes, sir, they are all mechanized.

Q. Give us a short history of your mechanizations. A. We started our mechanization program in late '40 and there was a transition from hand loaded mines to mechanized mines. I would say that our mines became completely mechanized in about 1943 or '4.

Q. What about the mechanized equipment, machinery or equipment as to improvement? What have you done with reference to improving the mechanization in your mines?

A. Well, of course, we try to keep abreast of all improvements. We only have one what is known as a "continuous miner" which we use somewhat as a Guinea pig.

The balance of our mechanization is with conventional loading machine, equipment that goes through the cycle of drilling, cutting, shooting, and loading the coal. And in a continuous miner, of course, that is all done in one
3041 operation.

Q. My attention is called to the fact that you stated—I didn't catch it at the time—that you started mechanization in the '40s or late '40s and finished in 1943. What is your statement so we have the record clear on that?

Testimony of Mark E. Eastin

A. What I meant by that was that we put in our first mechanized mine in the late '40s and was successful, and so then we gradually converted to complete mechanization which—I am trusting to my memory, but I think that completion was about '43, 1943.

The Court: He means in the late '30s? You said you started in the late '40s and finished in 1943. A. That is right.

Q. The late '40s would be subsequent to 1943, wouldn't it? A. I don't get your point, sir. We put in our first mechanization in '40 and then we continued in the 40s—

Q. You stated "late '40". You mean late in the year 1940. A. Yes, late in the year 1940.

Q. The record shows "late in the '40s". A. I see. It took us two or three years to complete that transition from the hand loading mine to the mechanical operation.

3042 Q. So it was in the latter part of 1940 and you finished the mechanization in 1943. A. That is right.

Q. Was there in the same operating territory formerly a mine company by the name of Nashville Coal Company?

A. Yes. Nashville Coal Company started as a sales agency or a jobber, coal sales agent, and they eventually became interested in actual production and in properties and acquired coal lands and developed into a right substantial operating company in the field.

3043 Q. In the early 1950's where were the operations of the Nashville Coal Company, I mean its territory or land on which it was producing? A. Principally in the same areas that we were working ourselves. They had mines in Muhlenberg, mines in Hopkins County, mines in Union County, in western Kentucky.

Q. Did the West Kentucky Coal Company acquire the Nashville Coal Company and its properties? A. Yes, after negotiating during the year of 1955, we entered into a deal with Nashville Coal Company, which was signed September 13, 1955, effective October 1, 1955.

Testimony of Mark E. Eastin

Q. And in that contract did West Kentucky Coal Company acquire all of the properties formally owned by the Nashville Coal Company? A. Yes. We actually acquired the physical properties, the mine sites, the machinery, their boats, barges and then we entered into a lease on their coal lands.

Q. And you presently hold the lease that they had on coal lands? A. That is correct.

Q. You spoke about acquiring barges and so on which would indicate water transportation. Was West Kentucky ever engaged in transportation of coal by water? A. Well, yes, for many years in a right substantial way. I explained that the property was originally acquired for the
3044 purpose on the river—acquired on the river for the purpose of the reserve for the Union Electric Company of St. Louis, which was also on the river. Being on the river, for many years we operated tow boats and barges up and down the rivers. We had river terminals at Memphis, Vicksburg, Donaldsonville, New Orleans, and on down.

Q. Was that use of barge delivery of coal from your mines continued on continuously or was it abandoned or changed at any time? A. No. In time we gradually reduced our river activities and we had some river movement by others. Then when the North American Company, under the Securities Exchange Act, was ordered to integrate its properties, before they distributed our stock, they gave the Poplar Ridge properties, which was our river properties, to the Union Electric Company, including our barges and so forth, and so we were out of the river business for a number of years, because we had no property located on the river.

Q. When you acquired Nashville Coal Company in '55, did they have river moving coal equipment? A. Yes, operating.

Q. Was it operating in the name of a subsidiary or division or what, if you recall? A. They operated under the

Testimony of Mark E. Eastin

name of the Potter Towing Company. It was either a
3045 partnership or separate corporate entity of some
kind.

Q. Did the properties that were formerly handled in the name of Potter Towing Company come to West Kentucky at the time you acquired Nashville Coal? A. That is correct.

Q. Since that time have you been engaged in the transportation of coal you produced both by water and by rail?

A. That is correct, sir.

Q. Into what areas do you deliver coal from your sales on water transportation? A. Well, we deliver coal up the Tennessee River as far as Guntersville, Alabama. We deliver coal along the Ohio down the Mississippi, up the Mississippi by water.

Q. Now you also have rail deliveries? A. Oh, yes, all of our mines but one are located on rail.

Q. Over what areas are your sales usually made, the general area in which your coal is distributed? A. Well, the area, our market area has changed over the years. There was a time when our principal market was in the south. Due to the inroads that gas made in these markets. I would say our primary market is possibly north, northwest, in the Chicago area, Iowa, Wisconsin. We export some coal to Canada, which coal is dumped through a terminal in Chicago. Now, of course, we market coal in Tennessee,
3046 and I am speaking chiefly of west Tennessee, western Kentucky. We go as far east in Kentucky as Louisville.

Q. In connection with the marketing of coal, do you sell coal to other coal companies as well as to consumers? A. Yes, we have always done that to varying degree, depending upon what the situation was at the time. If we had surplus coal and there was demand for coal, if we had coal on tracks, we often sold that to various sales agents or jobbers who marketed coal. They had a list of customers and we allowed them a commission on it.

Testimony of Mark E. Eastin

Q. Among other companies that you have sold coal to over the years, have you sold to Peabody? A. Yes, we have sold coal to Peabody before the merger of Sinclair with Peabody. We sold them substantial coal, a substantial amount of coal, and then after the merger, when Sinclair Coal Company became Peabody and when their sales company, the Southern Coal Company, became Peabody, we have continued to sell coal to Peabody, when they needed the coal or when it suited us mutually to act in that manner.

Q. Has there been any difference in recent years on your sales policy in sales of coal to Peabody from what has been true throughout many years? A. No, sir, there has been no difference in the policy. The demand for coal might change the situation slightly. That is if they don't need the coal, we can't very well sell it to them, or if we don't need the coal, we wouldn't buy coal from them, when we had coal in our own mines, but the policy has not been changed in any way.

Q. Mr. Eastin, have you had prepared at our suggestion a tabulation showing the production of coal by West Kentucky? A. Yes, sir. I have a copy of that.

Mr. Kramer: Will the reporter mark this as the next exhibit, No. 171.

(Exhibit No. 171 was marked for identification and filed.)

Mr. Kramer: These figures, if I may explain, your Honor, in the last column marked "National Tons" are taken from the publications that are already in the record, so I do not go back to those.

Now the figures under "West Kentucky/Nashville" showing the number of tons produced per year come from the company records, and these have been examined and are in the record, but not combined in this form.

Most of this is in that deposition you have, which has been read, but not in tabulated form.

By Mr. Kramer:

Testimony of Mark E. Eastin

Q. Will you explain, Mr. Eastin, what you mean
3048 or what we mean by this tabulation under production? How do you get the production and what figures are included? A. Well, in these particular figures, they represent the tons of coal that were actually produced by us from our properties. Of course, there are two or three ways of figuring.

Q. That is the reason I want to get it. How is this figured? A. Well, it is actually a count of the tons of coal produced from our properties. Now that does not include coal that was mined from our properties by someone else under these leases, and, of course, it does not include coal purchased by us from others for sale. That would be sale tonnage. This is actually production tonnage we produced ourselves.

3049 Q. Did you — your own employees produced? A. Correct, sir.

Q. I notice, beginning with the year '53 and '54, under this column marked West Kentucky-Nashville, there is but one figure for each year. That is West Kentucky production because it was before you acquired Nashville Coal, Inc., is that right? A. That's correct, sir.

Q. Now beginning with 1955, while West Kentucky had been the owner of Nashville, have you separate records showing the amounts produced and so on? A. Yes.

Q. Is the figure in 1955 and so on through the years where it says West Kentucky, the coal actually produced by what was West Kentucky mines before and Nashville by what was — by the Nashville mines before? A. That's correct, the Nashville figure of course is for October 1st on 1955.

Q. I see. A. And then you have a full year of Nashville production starting the next year.

Q. Beginning 1956? A. That's correct, sir.

Q. So that the total coal produced by West Kentucky

Testimony of Mark E. Eastin

including both the West Kentucky and Nashville divisions — I don't know whether you call them divisions or not — for 1955, was 4,112,127 tons? A. That's correct, sir.

Q. It varies from that in 1955, I believe, to a high in 1956 of 7,714,646 tons. A. That's correct, sir.

Q. And in 1957, 6,521,541 tons? A. That's correct, sir.

Q. And '58, 5,723,692 tons? A. Correct.

Q. In 1959, 5,932,869 tons? A. That's correct, sir.

Q. In 1960, 6,256,186 tons? A. That's correct, sir.

Q. Mr. Eastin, in its production of coal and its operations, has West Kentucky operated at a profit every year from its earliest days down to the present time? A. Well, hardly. I probably should correct that and say a lot of the time we unfortunately operated at a loss.

A review of the records of the company since its inception back in 1904 and '05, showed that they started off with losses in the early years. That was extended for seven or eight years, and then there have been other periods in the history of the company where you have had losses for as many as four or five years in a row, and then there's been periods of one or two years when you would have losses scattered through there.

Unfortunately, the coal business, as I have observed it, and as I know it, is full of valleys and peaks. Sometimes it is described as a business where it's either feast or famine, and we have hoped that that would level out in time, but we still have the wide fluctuation, and in those periods when demand is light, why coal companies sometimes have some bad information for their stockholders, I might put it that way.

Q. Are there certain items of expense or charges that — overhead, etcetera — that must go on regardless of volume of sales? A. Oh, yes, sir. That is one of the problems of our industry, particularly in the midwest. You have got to produce your coal and market it. You can't store it well

Testimony of Mark E. Eastin

at the mines, and I refer in that respect particularly to coals produced in the midwest, because there is a tendency, unless they are stored very carefully and impacted and cared for properly, for this coal to ignite, to burn, and not only will it catch fire, there is the expense of putting it on the ground and picking it up.

Consequently what usually happens, you run until you get your tracks full, that is of coal, assuming the market is slow, and then you have to move that coal to run again. Well, then you might move the sizes that are in demand, current demand, and there may be some sizes there that you might refer to as resultant sizes that are left on track, and in time those resultant sizes will develop to where you couldn't run your mines, and you have got obligations for other sizes, so it creates problems.

It is not like other industries where you can produce your product, and store it, and wait for a market to develop. That situation is not quite as broad in the strip mining end of our business as it is in the underground end.

Q. Explain please. A. Well, in a strip mine, you can go ahead and uncover to a considerable degree the coal, and it is there ready for loading.

Q. Just take off the overburden? A. Just take off the overburden and leave it in what they call the pits.

Q. Yes, sir. A. And when the market is there, you put your shovels in there and load it out and rush your production up to take care of the situation.

But in an underground mine, which our company is principally operators, or which we operate mines, you have got to move that coal every day or the mine can't run the next day.

Q. During the years that are shown on this exhibit number 171, which runs from the years running from 1953 through 1960, were any of the years — were the operations of the West Kentucky during any of these years operated at a

Testimony of Mark E. Eastin

loss? A. Well, yes, sir, we operated at a loss in 1960, which is right embarrassing. It is always embarrassing for the —

Mr. Kramer: Just before you go ahead. Your Honor, those figures of 1958 are already in the record in Exhibit 70, I think it is, or 71, and we are going to refer to that.

The Court: All right.

By Mr. Kramer:

Q. Now, go ahead, Mr. Eastin. A. Well, I said it is a little embarrassing to the president of the company to have to explain losses.

Q. You always have to do it to stockholders, so explain to us, please. A. With six thousand or seven thousand stockholders, and I even have to explain it to my family and young son why we lost money.

Q. You mean he doesn't get as much money to go 3054 to Vanderbilt on? A. Well, I don't know that that has anything to do with it.

Q. Well, go ahead. A. Anyhow, as I analyze the situation, in this country, if we have a national economy of coal production at a level of about five hundred million tons, the coal industry is in a healthy state, and I would say practically all coal companies can operate satisfactorily and at a reasonable profit.

Now when the national production falls below five hundred million tons, as it did in '58 down to 405,000,000 tons, that is a loss of ninety-five million tons — no, I beg your pardon — it fell from 490,000,000 million tons down to 405,000,000 tons. That is a loss of eighty-five million tons.

Then the industry gets into what we refer to sometimes as a depressed state. That is, there is more capacity, there is more coal than there is business.

Well, of course, every fellow feels that maybe he should operate his properties, and he's got good reasons to. Maybe he owes the banker, or he has mortgages of other types that he's got to take care of, so he makes a special effort to operate his properties, and in so doing, the effect is

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that you begin to depress the market.

3055 So, you have got your fixed expenses that you mentioned a moment ago, and you want to make these fixed costs, so you start trying to find business to operate your mines and the other fellow, he's in the same shape, and you gradually work the thing down until your realization has suffered, and the first thing you know, you are in red figures.

3056 Now that is not the fault of any one particular party. It is a collective action that develops as a result of the circumstances.

Q. What about the competition for markets when you have this over-production or an under-consumption, whichever you want to say? A. It becomes very intense.

Q. Ordinarily will it reduce the prices? Will it cause a reduction in prices? A. Very definitely, yes, sir, substantial. The longer it lasts, why it seems the deeper the prices go.

Q. Let's take your figures for 1956. I see you have them in front of you. Maybe we had better begin with 1955. They are not shown on this exhibit but they can be marked on it.

Did West Kentucky during the year 1955 operate at a profit or loss? A. We operated at a profit in 1955 of \$938,000.00 on a national production of 470,000,000 tons.

Q. Tell us about the year 1956? A. We had a profit of \$1,465,000.00 with a 500,000,000 ton national production.

Q. Now 1957? A. We had a profit of \$1,254,000.00 with a national production of 490,000,000 tons.

3057 Q. And now we come to 1958 where you told us there was a loss. A. We had a loss of \$204,000.00 with a national production of only 405,000,000 tons.

Q. Let's take 1959 —

Mr. Kramer: Of course, your Honor, we are continuing our objection but in view of the record we are meeting the

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proof your Honor has permitted, without waiving our objection.

By Mr. Kramer:

Q. Now go ahead with 1959. A. Then in 1959 we got back in the profit column with a 410,000,000 ton production and, incidentally, \$410,000.00 profit.

Q. And now what about 1960, if you have it there? A. We had \$749,000.00 profit and the national production was 413,000,000 tons.

Q. The 413,000,000 ton production is the national production? A. That is right.

3058 Q. Not your production. A. That is right.

Q. Go ahead, you started to explain. A. The management would want to take credit for having made some improvements that got us in the profit column in those years, if I may.

Q. Naturally.

Mr. Eastin, was the loss suffered by West Kentucky Coal Company in 1958 due to a decrease in sales price carried on for the purpose of driving operators, any operators, out of business?

A. No, sir, never. We were just trying to look out for West Kentucky Coal Company.

Q. Did you have any agreement or understanding of any kind with any other coal producers on any reduction of price and which agreement — go that far.

Did you have any agreement among coal producers to reduce prices? A. No, sir, never.

Q. So far as you know did any agreement of that sort exist in the industry? A. No, there wasn't, that we ever heard of.

Q. If it did you people did not participate therein? A. No, sir, in fact, we are trying to improve our realization, 3059 not hurt it.

Q. Something has been said in this record about

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a contract for the sale of coal which the Tampa Electric Company had with certain producers of coal in the area in which you operate.

Did West Kentucky Coal Company have anything to do with the original entry or making of that contract?

A. No, sir. The first contract with Tampa Electric was made by the Nashville Coal Company on May 23, 1955, which was before we acquired the property.

Q. While that was before you acquired the property as you say, did you people enter into negotiations or participate in any way in those negotiations for that contract? A. No, sir. We knew nothing about it.

Q. Anything to do with the pricing or the price per ton that that coal was to be furnished at? A. No, sir.

Q. Consulted about it in any way? A. No, sir.

Q. And you, West Kentucky, was not in anywise interested in the making of that contract? A. No, sir.

Q. When you purchased — and when I say “you” I mean West Kentucky — purchased the Nashville Coal Company, the Nashville Coal Company already had that 3060 contract? A. That is correct.

Q. Did you acquire that as one of the items that was acquired in the acquisition of the company? A. That is correct, sir.

Q. After having acquired that contract, what, if anything, was done with reference to that contract by West Kentucky?

A. Well, initial deliveries were to start on that contract in March, 1957. We acquired Nashville Coal Company October 1, 1955, that is when we took the properties over. Much had to be done to get ready to deliver coal to Tampa. There was no coal moving down there at that time.

I say, much had to be done, floating equipment, transfer equipment, unloading equipment — those things had to be constructed. So, we immediately —

Q. How would the delivery of that coal have been made?

A. It would have been loaded on barges at Uniontown,

Testimony of Mark E. Eastin

Kentucky, floated downstream on the Ohio and Mississippi to New Orleans, or to Wood Park, Louisiana, which is about 40 miles below New Orleans, and there it would have been unloaded from the barges onto the bank at the facilities that we constructed there for that purpose, and then it would be re-loaded or transferred to ocean, or gulf — ocean going or gulf vessels, for transportation across the 3061 Gulf to Tampa Bay where the Gannon steam plant is located, and those ocean-going vessels would have been unloaded at the power plant of the Gannon station power plant, and stockpiled and burned.

Q. You refer to coal being produced or being mined at the Uniontown mine. Was the Uniontown mine one of those that West Kentucky acquired in its purchase of Nashville Coal? A. Yes, sir.

Q. You spoke about the arranging of equipment. When did West Kentucky begin the accumulation, purchase or manufacture of equipment and facilities to be used in connection with the movement of this coal? A. Well, we began almost immediately. In fact, Nashville already had—Nashville Coal Company, already had some plans. For instance, they had a large towboat on the drawing boards.

Q. Before you go further and explain, which I want you to do, you said “we began almost immediately”. Explain “immediately”. A. Well, just as soon as we took over the property we —

Q. As soon as you purchased it? A. Yes.

Q. All right, go ahead. A. We first had to make a survey of the situation, and we employed consultants and 3062 determined, or attempted to determine just what the problems were, and then we had people bid on the construction of this equipment that was necessary, including a large towboat that was built particularly for the movement down the Mississippi, and we proceeded to get ready to make deliveries on this contract and we were crowded for time.

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Q. Now in order to meet necessities at Tampa, was any temporary arrangement made? A. Well, during the course of the situation they ran a little bit behind schedule in getting ready to receive the coal, and we were running behind schedule in our efforts to get ready to deliver the coal, and by mutual agreement the deliveries were set back a month or so. And then we finally delivered, I think it was, 118,000 tons down there on a spot order because they needed to get some coal on the ground, if that is what you have in mind.

Q. Now what happened with reference to this contract after you had started to get ready to fulfill it? Did anything occur with reference to the contract? A. Well, we were taking a good close look at the contract. We had our attorneys going over the contract; and we had an opinion from our attorneys that the contract was illegal or invalid and was not binding on either party. And since it was a 20-year contract, we were spending a lot of money to get 3063 ready to move that coal down there, it was pointed out that unless a firm and binding contract existed that most any time that the oil market was such that they might want to come along and make lower prices to the Tampa Electric Company that we might be pitched out the window, so to speak, and that we had no binding contract and it should be made a binding contract.

There were one or two factors in the contract, or provisions in the contract, that were not satisfactory, and so we then entered into negotiations with Tampa Electric people to make some changes in the contract and to make it binding and legal on both parties.

Q. During the period of those negotiations, while you were trying to make certain you would be protected by a binding contract, did anything happen or did Tampa take any attitude on the situation or procedure? A. There was considerable negotiating back and forth which was unsuccessful, and in time Tampa notified us by letter they were

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terminating the contract. And then they also moved in the courts to have a declaratory judgment made of the contract to determine whether or not it was a valid contract.

Q. Now the lawsuit that was filed to determine the validity of that contract which your attorneys questioned, was filed not by you but by Tampa? A. That is correct.

3064 Q. The cancellation of that contract was made not by you but by Tampa? A. That is correct, sir.

Q. I take it, you did not request Tampa to cancel the contract? A. No, sir. We implored them to continue to negotiate with us and work with us, and we had every intent of filling the contract some way, somehow, but we wanted a firm and binding contract before we started making deliveries under it.

Q. Was any coal ever shipped by you on that contract? A. Not on the contract; no, sir.

Q. You did have this spot order that you mentioned? A. Yes, that is correct.

Q. According to this record sometime after this, shortly after probably, Tampa Electric entered into a contract with Peabody Coal Company. Did you participate in that entry, have anything to do with it? A. No, sir, none at all. In fact, we felt that that business, having — we had bought that business from Nashville Coal Company, had pioneered the movement down there, and we felt that was our business and we did not like it much when Peabody went in and meddled into it and finally made a contract. That is
3065 the situation.

Q. So that you did not cooperate or have anything to do with Peabody obtaining that contract? A. No, sir. We didn't cooperate to the extent that they came to us and wanted to use our unloading facility at Tampa and we refused to do it. They took the position it would be better for the unloading equipment to be working than sitting there rusting, but we didn't want them moving coal to Tampa Electric. We wanted to work that out for ourselves.

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Q. Did you take any attitude in connection with the negotiating between West Kentucky and Tampa or the procedure that occurred for the purpose of getting released from that contract so that you could use, using the expression used here, dump coal that otherwise would have gone there into the TVA market and thereby depress it? A. Oh, no, sir, never.

Q. Did you ever have any such purpose or motive at all so far as West Kentucky was concerned? A. Certainly not.

Q. Ever have any negotiations with anybody or looking for any accomplishment of any such purpose? A. No, sir, never.

Q. Or any intent upon your part to do anything of that sort? A. No, sir.

3066 Q. After time went on and sometime after Peabody did get in there and take this market away from you, did you make an arrangement in which you might ship some coal down there? A. Yes, sir. We entered into an arrangement with Peabody whereby we would share one-half of the tonnage.

Q. Has any coal ever been shipped on that arrangement? A. No, sir, not yet.

Q. Do you know that there is existing in Memphis recently constructed a municipal steam generating plant? A. Oh, yes.

Q. Did West Kentucky enter into competition to obtain sales of any of its coal to the Memphis steam plant? A. Yes, sir.

Q. As a result of those negotiations was West Kentucky awarded a contract? A. Yes, we were awarded a contract for — I think it was for ten years at a rate of about 25,000 tons per month.

Q. And are you engaged in delivering on that contract now? A. Yes, sir.

Q. Did the entry of Peabody — I don't mean Peabody — West Kentucky into that contract have as a pur-

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3067 pose any depression or interfering with the coal market in east Tennessee or in any other TVA area?

A. Certainly none that I know of. I can't conceive of it.

Q. Did other people also get awards at the same time from the Memphis steam people? A. Yes, sir, they awarded the business to three concerns.

Q. Can you name them for us, please? A. Peabody Coal Company and Pittsburgh Midway Coal Company.

Q. Somebody said something in this record a day or two ago, maybe it was further back in the depositions, I don't recall, about Kirkpatrick Company being awarded a portion of that coal. Do you know anything about that? A. Well, the Kirkpatrick Coal Company's main office is in Memphis, and they have been there for many years and they don't have facilities for putting coal on water. They can ship their coal to Grand Rivers and load it on water there, but because of the rate between their mines and Grand Rivers, they wouldn't be competitive. They acted as sales agents in the thing. That is, they acted as salesman and we agreed for their help in selling the order, that we would pay them, I think it was $7\frac{1}{2}$ cents a ton as a commission on one-third of our award.

3068 Q. When you say "we", are you referring to West Kentucky Coal Company? A. Oh, yes, West Kentucky Coal Company.

Q. That was your own contract with them and not the group? A. That is right.

Q. You had no joint agreement? A. No.

Q. Are you shipping on that order or on that contract to Memphis? A. Yes.

Q. Have you sold coal to either of the other parties who received bids on there, on that contract or on that award, for delivery under their contract to Memphis? A. Yes, we have been shipping Peabody's order of late for them by

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agreement with the Memphis power people and agreement between ourselves and Peabody.

Q. So you are selling to Peabody the coal that they would furnish on that contract? A. That is right.

3069 Q. Now was there any agreement in connection with that sale or that coal that you made to Peabody, that that was done for enabling Peabody to dump other coal into the markets and thereby depress the markets? A. Oh, no, sir.

Q. Any such understanding or promise or agreement of any kind? A. No, sir.

Q. Is that simply a straight sale by you to Peabody of that quantity of coal? A. That is right. You understand we make the delivery, too.

Q. Yes. You sell the coal and you make the delivery of it? A. That is right.

Q. Does that coal come from your own production? A. From our Uniontown mine.

Q. So that you are selling it as a delivered coal to Memphis? A. That is right. But Memphis pays Peabody for their coal. They pay us.

Q. In other words, you haven't even taken over the contract then? It is a contract between Peabody and Memphis and you sell the coal and you get your compensation from the person to whom you sell it, namely Peabody? A.

3070 That is right.

Q. You say there are no side agreements of anything with reference to any other deliveries or sales in connection with that? A. No, sir.

Q. Mr. Eastin, what about sales of coal to Tennessee Valley Authority? Yesterday I believe your man Hoffman stated they began the sales in the early 40's, somewhere. Have you personally handled those sales to TVA? A. No, sir. Mr. Hoffman, that is his account. He looks after the sales to TVA.

Q. Have you done any of the negotiating for sales of coal

by West Kentucky to Tennessee Valley Authority? A. No, sir.

Q. So far as you know has there ever been any cutting of prices or depressing of prices in the sales that have been made by West Kentucky to TVA for the purpose of forcing out some small operators or other operators and take them away from the TVA market? A. No, sir, never.

Q. Ever been discussed in your presence as president of the company? A. Never.

Q. So far as you know has there ever been any discussion among any company personnel? A. No, sir.

3071 Q. Any authority ever been granted by the West Kentucky Coal Company to do any such thing? A. No, sir.

Q. As far as the actual sales and negotiations or submitting of bids, Mr. Hoffman looks after that? A. That is correct, sir.

Q. Does the West Kentucky Coal Company have a collective bargaining agreement with the United Mine Workers of America? A. Yes, sir.

Q. When did West Kentucky first enter into a collective bargaining agreement with the union, United Mine Workers of America? A. Oh, our first contract was signed with the United Mine Workers on February 15, 1954, effective March 1, 1954.

Q. Did you personally sign the contract or was it somebody else in the company? A. No, sir, the then president signed the contract.

Q. Was that Mr. Hooper Love? A. Yes.

Q. Is he dead now? A. Yes, sir.

3072 Q. Before that contract was signed, what, if any thing, did you do to ascertain whether or not the United Mine Workers of America had been chosen as a collective bargaining agent by your employees? A. Well, the United Mine Workers first advised us in writing that they represented a substantial portion of our employees

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and asked us to enter into — to bargain with them. We replied by letter that we would bargain if they could show us that they represented the majority of our employees. From there on there were a number of meetings held, which I participated in, in which they brought in membership cards, signed cards, and at first we took the position that they didn't represent a majority of our employees. There were certain discrepancies in some of these cards as we saw them and we —

Q. What type of discrepancies, just briefly? A. Well, the names didn't gibe with our payroll names in some instances. In fact, I recall there were some cards presented where we knew the men couldn't even write that were signed. Well, we said, "We can't accept those cards."

Well, the cards were returned, and the man made his mark and they brought them in later and we were satisfied that they were valid cards.

There would be occasions where maybe a card would be, for example, signed Harry Jones, when our payroll 3073 records showed that we — didn't show us having a Harry Jones, might have H. G. Jones. We said, "We don't have a Harry Jones."

They said, "That is the fellow so and so."

"Well, you will have to correct that."

So the card would go back and then eventually come back signed properly. We compared the cards to the signatures that we had in our payroll department, and in time about — I think the last meeting was about December 10, '53, it became definitely evident that they had a majority, represented a majority of our employees.

Q. And that having been ascertained, did you then enter into the collective bargaining agreement? A. Yes, sir, we signed the contract in February, the following February.

Q. Since then there have been several amendments made to the 1950 collective bargaining agreement of the United

Mine Workers. Have you people joined in those amendments? A. Yes, sir. We have continued right through.

Q. Have you signed any of the extensions or amendatory agreements personally? A. I signed the second one, yes, sir. After our original contract with the union, I signed the next one.

Q. And the others have been signed by others as representatives of your company? A. Well, the president
3074 signed the first one, I signed the second one, and I think, I am sure by that time we had joined the coal producers, the West Kentucky Coal Producers Association, who have signed for us since. They represent the other union — the other operators who have contracts with the UMW.

Q. But your company has been and is now, has been since 1953, December — '54 — A. '54.

Q. And is now a party to this United Mine Workers' collective bargaining agreement? A. That is right.

Q. During the period that you people have been under this contract of the United Mine Workers of America, has that organization or any officials thereof attempted to dictate to you or your company selling policies? A. Oh, no, never.

Q. Pricing? A. No, sir.

Q. Tried to dictate anything in connection with the management prerogatives? A. No, sir.

Q. Have they influenced pricing policies, that is when you would price to TVA, that you had to meet certain standards or anything of that sort? A. No, sir; never.

3075 Q. Have you or your company at any time since 1950 entered into any agreement of any type whatsoever or done anything at all toward a joint policy with Island Creek Coal Company, Peabody Coal Company, Pittsburgh Coal Company, Pittsburgh Midway Company, Pittsburgh Consolidated Company, or any other coal company

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for the purpose of arranging prices for the sale of coal in the territory in which you sell? A. No, sir.

3076 Q. Or for the purpose or with the intent either of depressing the market for the sales of coal in the area? A. No, sir.

Q. So far as you are aware, has anything been done by West Kentucky with reference to accomplishing the results I have just referred to? A. No, sir, nothing that I know of.

Q. Or taking the same questions, premise, for the purpose of eliminating from the industry any coal producer, large or small? A. No, sir.

Q. Now, I ask one more question. Do you know whether Tennessee Valley Authority at the present time is contemplating — maybe already started — the building of an additional steam generating plant somewhere in East Tennessee? A. Yes, sir, I have heard quite a lot about it. I don't have any definite information about it except that it is — its approximate location, and it is to be one of the largest plants ever built, and the largest in their system.

3077 Q. Do you know about where it has been determined to locate it? A. Well, near Oak Ridge. I recall there was quite an effort made to get it located in Kentucky, but it has been located near Oak Ridge.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Eastin, I believe you talked about the peaks and the valleys of the coal industry. A. Yes, sir.

Q. That's been going on ever since you have been in it, I take it? A. That's right, sir.

Q. Goes back a number of years? A. Thirty odd years.

Q. And there would be times of great demand from the markets, and you would have a peak, is that right? A. That's correct, sir.

Q. And there would be valleys when demand stopped or slowed down? A. That's correct, sir.

Q. I'll ask you if you agree with this general statement that Mr. Lewis, John L. Lewis, made at the 1950 bargaining conference, the first session, with respect to the bargaining over the 1950 contract.

Mr. Rowntree: This is the 1950 minutes, page sixty-six.

Mr. Kramer: Of course, Your Honor, I am going to object to that for this reason. These people were not a party to that. They didn't go into the — under the collective bargaining agreement until 1954, and they were not a party to those negotiations.

Therefore, I don't think any statement made by someone else outside is proper for questioning this witness about.

Mr. Rowntree: I am just asking him if he would agree with this statement.

Mr. Kramer: I don't know what that has to do with this lawsuit.

Mr. Rowntree: He was talking about economics.

The Court: All right. I'll let him answer for that purpose only. You are testing his —

Mr. Rowntree: Yes, sir.

The Court: His knowledge of economics?

Mr. Rowntree: That's correct.

3079 The Court: Members of the jury, the Court has held that counsel may ask this question solely for the purpose of testing this gentleman's knowledge of economics and the standards that he follows in arriving at these conclusions with respect to economic questions about which he has been asked or will be asked before he leaves the stand.

Mr. Rowntree: That is page 296, 1948, where he stated, among other questions, quote:

"There are times when extraordinary conditions, world demand, wars and rumors of war made more demand for the product."

By Mr. Rowntree:

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Q. That's true, isn't it? A. Oh, yes.

3080 Q. And would you agree that in 1950 there was a —

A. Yes, that's true.

Q. And would you agree that in 1950 there was a need for stabilization in the bituminous coal industry? A. I don't know what you mean by a need for stabilization. There's always — as I view it — been a need for stabilization so that you could level this thing out and not have these peaks and valleys. I think that is what any industry likes to have.

I know the utility people, when the air conditioning load developed, they had always had a valley so to speak in the daytime in the summer, and when the air conditioning load came on, it leveled out the thing and consequently you didn't have a lot of idle generating equipment sitting by, and you developed the facilities and the organization to take care of a steady load rather than a peak and a valley.

And when you are in a valley, why your fixed charges are going on just the same, and when you are in a peak, maybe you are spending extra monies trying to meet the demands, and that is not a satisfactory and economical way to carry on a business, as I see it.

Q. And these large coal companies have very high fixed charges? A. Yes, sir.

3081 Q. That continue on? A. Yes, sir.

Q. And stabilization would be tremendously desirable to the big companies? A. Well, I again don't know what you mean by stabilization. I go back to the statement that it is desirable to level out the business and not have the peaks and the valleys.

Now, if you are talking about stabilization, I recall, going way back, that there was some — well, there was an effort made to stabilize prices during NRA days, something like that.

I never subscribed to those means. I don't think it should be artificial. I think it should be a natural course of events where you are geared to meet a steady load.

I don't know what you mean by stabilization in this case.

Q. Stabilization of prices and stabilization of production. A. Well, in my experience in the coal business, you have got to—I don't know, seven thousand producers—and you have got as many or more selling that coal, and if anybody could stabilize it, they would certainly be a magician, or they would be a wonder. I don't know
3082 how you would stabilize it.

Q. In other words, you have got too many producers?

A. I wouldn't say we have got too many, but we have got a lot of producers. It's not like a situation where you have got a few producers. We have just got a lot of producers, and when you have got a lot of producers, that's a lot of people to work with, and I don't see how it can be stabilized.

Q. Well, it's a problem of having so many producers in the industry? A. Well, maybe it is. I don't know.

Q. Mr. Eastin, you are familiar with barge rates with respect to the hauling of bulk coal? A. In a general way. You go and ask a quotation on a movement of coal, and a whole lot depends on where it's going to move and how many locks you have got to go through, and how long the movement is going to be. Of course you wouldn't expect to get as good a rate on a short movement as you would a long movement.

There are a lot of things that enter into it, but you go and ask people like Federal Barge Line or Mississippi Valley Barge Line, or those that are in that business, and they would probably start off by talking about a three mills per ton mile, again depending on how much lock time
3083 delay there is going to be, and how far you are going and so forth.

But you work on, and that becomes competitive like everything else, and you finally find that you can get that coal moved, in my opinion, for less than two and a half mills. I think the TVA uses two mills per ton mile plus twenty-five cents. I don't know how they arrived at that.

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Frankly, I know that coal can be moved even less than that if conditions are good and you have got the right kind of equipment.

Q. Those rates apply over the country pretty generally on the riverways? A. Well again, an upstream tow would depend — have some bearing on your rates. You can tow downstream cheaper than you can tow upstream.

The prospect of whether or not if you take a tow of coal down, you could pick up a cargo of sulphur or phosphate or iron ore or something else and bring back would enter into it. This is just so many factors in considering rates that it's really pretty difficult to say what the rate would be.

Q. It varies all over the country then? A. Yes. Well, it varies to a degree depending again upon what the factors are. Now I hear talk in the trade that somebody goes to figuring, "Well, what could I deliver coal to a certain 3084 river point for?" They will almost invariably use two mills per ton mile, or maybe two and a half mills per ton mile. But they might end up, if they got the business, using some other figures.

Q. Bulk coal on the waterways is not regulated by the Interstate Commerce Commission, is it? A. No, sir.

Q. So the rates we are talking about is strictly the quotations from barge lines to shipper? A. And — that's right, and of course many people have their own transportation companies.

Q. That's right, including West Kentucky Coal Company? A. That's right, sir.

Q. And including Peabody Coal Company? A. That's right.

Q. And a number of other large coal companies? A. That's right.

Q. So really it wouldn't make much difference to them whether they went by water to the middlewestern markets with their water coal hauling it with their own barges? A. Well, I wouldn't say it wouldn't make any difference to

them. Their number one purpose, I presume, as is ours, is to market coal, but if you could go in some direction
3085 where you could get a back haul and make some money on that back haul, then that is the direction you would like to go in.

Q. And I think that would be an advantage in shipping coal by water to Tampa, Florida, right? A. That is questionable. When we first started making our investigations down there, we had been told that there was a substantial back haul business available, back haul commodities.

We employed experts, consultants, and they immediately pointed out to us that that had been greatly overrated, and that the business that did exist in many instances was seasonal—seasonable, I should say—that it didn't maintain at all times.

In other words, every haul couldn't have some back haul commodity with it. That—it was pointed out that the companies such as those I mentioned a while ago, who now enjoy that business, were not going to turn it loose to the coal company. If they were operating their own line down there, they were going to hold that business. That is their business, that is what they were in the business for.

That is what we found to be the case, and we finally have concluded now, after further observation, that possibly because of the turn around of your equipment that the back haul, and the delay in picking up these back haul
3086 products, often which are at other points, that maybe there is not much to the possibilities of profit from those back haul commodities.

3087 Q. But it did look like it was a pretty good opportunity to backhaul on the Tampa contract? A. It never did look that way to me. There was some people said that it held great prospects.

Q. What is the big commodity that is shipped out of central Florida? A. Well, phosphate and phosphate products primarily.

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Q. And there is a tremendous amount shipped out of Florida? A. Well, you say a tremendous amount. When we got into it we did not find that it was so tremendous. There is some moved. Now a lot of that movement is already contracted for on long term contracts, I am told.

Q. And that field of phosphate rock is located near Tampa, is it not? A. Yes.

Q. And so you were disappointed with respect to the backhaul of that phosphate rock? A. Well, I wouldn't say I was disappointed. Of course, it would have been fine if it was there, and I don't say that it is beyond the possibility of being worked out, but I did not think it was there in the beginning. I didn't think it was practical. You are talking about my own opinion of it.

Q. This contract that was originally made May 13, 3088 1955 was expressly assumed by West Kentucky Coal Company, was it not? A. Yes, that is right.

Q. And how long after the execution date was the date of assumption? A. Well, we assumed it when we took over Nashville Coal Company, October 1, 1955. The contract was made May 23, 1955.

Q. When did — Mr. Hoffman mentioned yesterday some talks with lawyers about this contract, but he wasn't present when the decision was made. When was the decision made with respect to the legality? A. I can't tell you off-hand, we had, of course, lot of conversations about that contract and other contracts we took over, and in the general course of business there is a lot of discussion about it at the office level, at my level, at the level of our directors, and we discussed it complete.

After all, we spent a lot of money. We discussed those things along with other matters of business with our directors and in the meantime our attorneys were going over these contracts, and not only the Tampa Electric but the other contracts, and after we were given a written opinion — a very firm written opinion, that this was an invalid

contract, that it was illegal, then we determined under the circumstances that we could not make deliveries under that contract unless we could negotiate it to a firm and valid contract.

Q. What was the date of that opinion? A. It is a matter of record. There is no secret about it. I don't have it with me. I have a copy of it in my files, of course; and I would be glad to furnish it if it —

Q. Well, that is not necessary. I just want to get an approximate date. A. I would just be afraid to say but it happened pretty soon after we were given an opinion, and then we continued negotiations and in time why they notified us that they were terminating the contract.

I can tell you when the contract was terminated that might help, if I may refer to this.

Q. All right, sir. Do you have a copy of this letter of termination? A. Do I have?

Q. Yes. A. Oh, yes. I don't have it here but we have copies of it. Be glad to furnish it.

3091 Q. I believe, Mr. Eastin, you have a date there of a letter of rescission? A. I can't give you the exact date of the letter of cancellation, I am sorry. That is one date I just don't have. I can tell you about when it was. It was shortly before February 16, 1959.

Q. Well, that was long after the lawsuit started by Tampa, is that right? A. Oh, yes, yes. The lawsuit was rather drawn out. It went through three courts.

Q. In answering the complaint filed in that case brought by Tampa Electric Company, there was no mention of any rescission of the contract on the part of Tampa Electric Company, was there?

A. I still don't get the point, sir.

Q. In other words, Tampa Electric Company brought the case with respect to this contract? A. That is right.

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Q. And alleged, did it not, that West Kentucky
3092 or Nashville Coal Company had refused to ship coal
on the contract? A. That is right.

Q. And in replying to that allegation, West Kentucky
and Nashville Coal Company made no reference to any
rescission or cancellation by Tampa Electric Company?
A. No, not that I know of. I will put it that way. Of
course, you understand, we were negotiating at the time we
got the letter, still trying to negotiate this matter to a sat-
isfactory conclusion.

Q. What were the matters subject to negotiation? A.
Well, the principal one was to make the contract a valid,
a legal contract. We were also attempting to renegotiate
a satisfactory escalation clause. The clause in that contract
on escalation was escalation tied to a government index on
the average manufacturing wage paid in the country. Nor-
mally coal escalation clauses are designed to apply to that
product, to coal. The escalation clause that was in the
Tampa Electric contract was not only not what I would say
is a reasonable escalation clause, but it had limitations to it.
The escalation was limited to 32 cents in any five year
period. Well, since that is a 20 year contract, of course that
is an objectionable feature because you don't know what is
going to happen in 20 years. If you have a limit on escala-
tion, you might be in trouble.

3093 Q. Isn't it true, Mr. Eastin, that that goes to the
amount to be paid for the coal and you were seeking
to get a higher amount for the coal? A. We weren't seek-
ing to a higher amount, we were just seeking to get an es-
calation clause that would return to us whatever happened
in the way of escalation. Of course, it would have worked
both ways. If the cost of labor and supplies and materials
had gone down, it would have actually amounted to a de-
crease to Tampa Electric, the type of escalation clause we
were trying to put in there.

Q. But you were concerned about your future prospects

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of increased costs and, therefore, worried about the amount that you would receive under the contract? A. Well, I think we can only judge the future by the past, and we have seen what has happened, inflation and in escalation, and we were willing to give them the benefit of any decrease in cost; but, on the other hand, we felt it was only fair that we should be reimbursed for any increase.

Q. And that was your concern, was it not? A. Oh, yes.

Q. And at that time you had your water facilities installed at the cost of several million dollars? A. We were working on them at that time, yes.

Q. And you had control of the water transportation to that market, the facilities for the water transportation? A. Well, I don't know what you mean by control. Now we owned our own transfer facility and we had our own equipment to move the coal down there, but there are other transfer facilities down there. There is one near Baton Rouge where they could perform the same service that we do, or we would do, and then you can always transfer this coal by midstream methods.

Q. But you, I believe, stated that you had to do many things over a period of time to get ready to ship to that market? A. That is right, to do it on an economical basis.

Q. And any other shipper to that market by water would have to go through the same thing? A. That is correct. Or use someone else's facilities that are there. Of course, we didn't contemplate any profit on the use of those facilities. If you use somebody else, there is a profit involved, no doubt.

Q. So with that control, did you not feel that you had virtual control over the Tampa market there and, therefore, could make demands upon it to increase the amount that you would receive for your coal? A. No, sir, I didn't consider that at all. We didn't consider that at all. I don't know what — there was always the possibility and

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the thing that happened that all rail rates would be reduced to the area.

3095 Q. Did you not conclude that you would divert that coal with the control that you had over Tampa, divert it to the TVA market and put it upon the spot coal market? A. No, sir, that never entered our minds.

Q. That is what was actually done? A. No, I don't think it was.

Q. Well, the coal was diverted to the TVA spot market? A. I don't think so, no, sir. Maybe some portions of it. We went through just a general course of business. For instance, in the year where we lost some money in 1958, that mine at Uniontown had a production of 1,700,000 to 1,800,000 tons per year. That mine ran only slightly above a million tons.

Q. And the Tampa coal would come from that mine? A. Well, that was the purpose of developing that capacity there was to take care of Tampa.

Q. And the biggest tonnage offered on the TVA spot market by West Kentucky came subsequently to this period of time; starting in September 1957, the big spot tonnage of West Kentucky came from the Uniontown mine? A. I don't know whether that is true or not. You say offered, I don't know whether we got the business. Apparently we didn't, because we didn't run the mine. If we have got the capacity, I see nothing wrong with trying to sell the
3096 coal and run the mine, and we had the capacity.

Q. But you had the coal sold to Tampa, did you not, Mr. Eastin? A. We didn't consider so because it was an invalid contract so we were advised by our attorneys, and if it was an invalid sale, it was not sold as we understood it.

Q. And it was your own attorneys that gave you that opinion? A. I don't know what you mean by our own attorneys. We employed specialists in that field to take a

look at it after there was some question brought up by our regular retained attorneys about it.

Q. And it was not Tampa Electric Company that was taking that position? A. Taking what position?

Q. That the contract was invalid. A. No, they took the position that it was valid from the very beginning.

Q. And it was subsequently held to be valid? A. That is correct, but in the two lower courts, the district court and the court of appeals, it was held to be invalid.

Q. But it was finally held to be valid by the Supreme Court? A. That is correct.

3097 Q. It was not until 1957 that any case was brought upon that subject? A. It was not until 1957 what, sir?

Q. That any case was brought on that question. A. I don't know what you mean by any case being brought, sir.

Q. Well, the Tampa case was brought in 1957, September 3, 1957, from the record in the case already? A. I presume that is right.

Q. You had approximately two years to bring a case to determine the legality of that contract before this case was brought by Tampa Electric Company? A. We did not wish to resort to those means. We wanted to negotiate the matter to an amicable settlement and we were still trying to, and would be glad to now.

Q. And you were concerned about the costs in the escalation? A. Why sure, and I think any prudent businessman would be concerned about the escalation clause, considering inflation and trends today.

Q. That is right. The upshot was that you made an agreement with Peabody Coal Company to ship half that tonnage to Tampa? A. Well, after, as I said, we felt that that was our business, we bought it—we didn't want to see them down there; but after they got the contract, we entered into an arrangement with them, and this was after the contract was made, and I am still not happy

3098

Testimony of Mark E. Eastin

about it personally, but we entered into an arrangement with them to furnish half of the coal.

Q. With respect to this Memphis contract, did Kirkpatrick Coal Company only solicit a contract on behalf of West Kentucky Coal Company? A. Well, I have learned since that they apparently represented Peabody. I didn't know that at the time. In fact, I didn't handle it and I didn't really know the detail on Kirkpatrick being in the picture. It was a sales matter.

Q. Is it not true that Kirkpatrick did obtain an order in its own name? A. I don't know. If they did, I don't know about it.

Q. Isn't it true that West Kentucky Coal Company is shipping coal on it? A. If it is an order for Kirkpatrick as such, I don't know about it. I am just not clear on that. I didn't handle it and I am not right, certain. All I know, we are paying Kirkpatrick $7\frac{1}{2}$ cents commission, which is not unusual in coal circles.

Q. I will ask you if you did not testify in your deposition, Mr. Eastin, with respect to this Memphis contract:
3099 "Question: May I ask, did the Kirkpatrick Coal Company also obtain a contract?

"Answer: Yes, they obtained an order and we are shipping that tonnage for them."

A. Well, if I testified that in my deposition, I don't know that they have got an order or whether they are being paid a commission and we have the order. I am not sure about that. I didn't handle it. That was apparently my impression at the time. I don't know that I am clear on it right now.

Q. Who made your contracts for sale? Who was in charge of your sales? A. Generally speaking, R. H. Bowden, vice president of sales. On the Memphis contract, our sales manager, Marshall Hicks, handled that.

Q. Mr. Bowden is in charge of your sales department, is he? A. Generally speaking, yes.

Testimony of Mark E. Eastin

Q. Where is he today? A. I don't know. He was in Madisonville yesterday.

Q. In 1959 I believe West Kentucky obtained a contract for 15 years from the TVA to supply approximately 850,000 tons a year, to TVA? A. That is correct, sir.

Q. That ran for 15 years, from 1959? A. That is 3100 the way I recall it.

Q. And in 1960 you obtained a contract for a million tons a year for ten years? A. That is correct.

Q. That gives you an assured shipping base to TVA of 1,850,000 tons a year for the next ten years? A. That is, correct.

3101 Q. Do you have any other contracts, term contracts with TVA? A. None that I know of. I don't think so. I think all the old contracts have expired, all the contracts except those two.

Q. Did this last contract include an option for the sale of an additional one million tons a year? A. We made an offer of a sale of an additional million tons a year. Hoffman handled that. Hoffman has the TVA's account. I don't really know what the status of that is.

Q. But it is — has any contract — A. We would be happy to have another million tons a year from TVA on that contract.

Q. Are negotiations currently going on about that contract? A. None now that I know of.

Q. Well, you have the right to ship them a million tons? A. No, sir. I would know that much about it, if they had another million tons to ship, as bad as we need the business.

Q. And I believe the West Kentucky Coal Company takes credit for the new shipping, new freight rate, from the West Kentucky field to Widow's Creek? A. Well, 3102 any time you are successful or a rate is reduced to a buyer, you like to take credit for it, because —

Q. Yes, sir, and — A. Because that puts the buyer morally at least under obligation to you maybe to give you some coal business.

Testimony of Mark E. Eastin

Q. Yes, sir. A. And that is the way a lot of coal business is developed.

You go in and the fellow says, "I can't take your coal, because it delivers at too high a price," and maybe you go to the railroad and say, "Look, if this fellow would give us a million tons of business, how about shaving the rate a little bit, I think we could — if we get a rate reduction, we could enjoy some of this business."

That's been going on for years and years — ever since I've been in the coal business — and you not only have to be a coal salesman, but you have got sometimes to be a rate salesman, looks like. There's nothing unusual about it, and I said we want to take credit for it, that's natural. We want to get the credit for having developed a lower price per million BTU as a result of the freight rate, and that is what we did.

Q. Do — you are not competitive in the Widow's Creek market? A. Well, I don't know about that.

3103 Q. Well, that is why you got the rate in? A. I presume so. You bear in mind, though, on bids to TVA, you don't bid to just one plant. We put it in, and they have a right to put it in anywhere, and they take the transportation costs to these various plants.

We may be shipping Widow's Creek, and they may call us on the telephone tomorrow and tell us to ship to Johnsonville, and cut off Widow's Creek.

Q. Yes, sir. A. So we don't know.

Q. And you have had discussions about a reduced rail rate from West Kentucky to the Kingston Plant? A. Well, I'm not sure about that, but if there was any chance of getting one, I imagine we have had discussions. Anywhere we think we can accomplish something that will help us sell — deliver coal cheaper, we are all for it. Don't make any difference whether it is by railroads or truck, by water, or what it is.

Q. Yes, sir. A. By pipelines. We have talked to people about putting pipe lines in.

Testimony of Mark E. Eastin

Q. Really the whole TVA system is open to you if you can get these rail reductions? A. Well, we never considered that the area over East Tennessee was open to us. We have felt that the western end of the section was easier to enjoy the business from, but I might point out that we consider that the plant at Paducah which is only sixty miles from our mines, and is on this side of the Ohio River — if you are going to say what business ought to be ours — it ought to be ours. But nevertheless the Illinois and Indiana mines ship in there, and they come across the river, and they have no freight differential against them. If we go north of the river, we have a substantial freight differential against us.

So, I don't know. I don't think the coal companies can allot what markets belong to them and what markets don't. I think you sell it anywhere you can sell the coal.

Q. It is a matter of carefully planning and developing your own markets as — A. Well, sometimes —

Q. As and where you can? A. Sometimes it is just a matter of catch as catch can.

Q. And Mr. Cyrus Eaton commenced buying stock in West Kentucky Coal Company along about 1951, did he not? A. We heard that he was buying our stock in 1951.

Q. Will you file this as next exhibit? Will you identify that as whether or not that is an annual report? A. Yes, sir.

Q. Of West Kentucky? A. Yes, sir.

(Exhibit No. 172 was marked for identification and filed.)

Mr. Rowntree: I'll just read one item in here, Your Honor.

Mr. Rowntree: This is page nine.

"Net income, 1950, before taxes on income, \$5,645,919."

"Net income for the year after taxes, \$3,270,919.

"For the year 1951, net income before taxes \$4,223,814; net income after taxes, \$2,916,814."

By Mr. Rowntree:

Testimony of Mark E. Eastin

Q. The fortunes of the company have gone down with respect to making profits since then, have they not? A. That's correct, and that is not unusual. As I said earlier, it goes up and down, unfortunately.

3107 Q. Is it not true, Mr. Eastin, that the United Mine Workers has had to put up assets to support the operations of the company? A. Well, I wouldn't interpret it that way. When we bought Nashville Coal Company, the experts, and some of us, were right optimistic about what the future coal business was going to be. Well, unfortunately, the experts, and some of us, were wrong about what the future of the coal business was going to be, and we have been in a depressed area since.

Mr. Eaton is a born optimist. He was one of experts that thought the coal business was going to be good and fortunately, I am not out on a limb by myself, but when the business was not as good, and we didn't generate as much money as we had contemplated that we would, why naturally we had to have some financial help from Mr. Eaton or from some other source, and we have used other sources and some preferred stock was sold.

But I know nothing about the UMW of A's relations with Mr. Eaton except what I read in the newspaper, and except that the latter part of '59, it became — I think it was the latter part of '59 — it became general knowledge that — through the Labor Department records and maybe otherwise — that they did hold some securities in our
3108 company, but we didn't —

Q. Well, is it not true that United Mine Workers made a pledge of five million two hundred thousand dollars to support a bank loan to the West Kentucky Coal Company? A. I know nothing whatsoever about that. No, sir.

Q. Mr. Cyrus Eaton runs the company, is that correct? A. Well, I am the chief executive officer. Mr. Cyrus Eaton is chairman of the board, and Mr. Cyrus Eaton has pretty well left the running of the company to the local officers.

Q. But he was the optimist, and he decided to buy Nashville Coal Company? A. Well, he was one optimist. There were a lot of optimists in those days about the future of the coal business. In fact, the investments that were made by the various trusts over the country, investment trusts, they all jumped in and bought heavily in coal stock. West Kentucky was included.

I know one outfit that bought fifty or sixty thousand shares of half a dozen coal companies, so everybody was optimistic about what the future of the coal business was going to be, but it hasn't panned out that way unfortunately.

We are still optimistic. You have got to be optimistic in this game.

Q. And you have got a right to be optimistic when you have got contracts in the amounts of one million tons a year to TVA, is that not true? A. Well, if we can get some more contracts, we will be more optimistic. We needed the contracts, and as I said earlier, we'd be happy to have another one.

Q. All right, sir. A. I might say, however, that our participation — I don't know whether that's been brought out or not — but our participation in the TVA total burn has not been unusual. In fact, we used to enjoy more tonnage, percentage wise, to their burn than we are enjoying today, and I think the record, if there is such a record, will bear that out.

Q. Well, we have got a record that was introduced yesterday, I believe, of that tonnage of West Kentucky, which does not extend, however, to the present situation which involves these two recent large contracts. A. We have had some contracts expire, by the way, in the meantime.

Q. Yes, sir, but is it not true that you now have an assured business of one million, eight hundred and fifty thousand — A. That's right.

3110. Q. One million, eight hundred fifty thousand tons to the TVA system? A. That's right sir.

Testimony of Mark E. Eastin

Q. For ten years? A. That's right.

3111 Q. And have you had any meetings with other coal company representatives with respect to negotiations preliminary to the submission of bids upon invitations received from the TVA? A. No, sir.

Q. Has Mr. Bowden had any such meetings? A. I don't think so. That is against the law and that is contrary to our policy. If he has he had no authority to do so, and I don't think he has. I never heard of it.

Q. He never reported to you any such meetings? A. No, sir.

Q. Mr. Eastin, with respect to the signing of the contract, I would like to read into the record a statement of Mr. Lewis in 1956, 1956 minutes, page 545.

"When Mr. Eaton's interests bought the West Kentucky Coal Company, which was operating non-union for more than 50 years, his first official act was to instruct that company to execute the industry agreement with the United Mine Workers of America."

Did you agree with that statement? A. I don't think that is quite the fact. I can't — I don't think the record will bear that out.

Q. When did Mr. Eaton come on the board of West Kentucky?

3112 A. Mr. Eaton was elected a director on December 12, 1952.

Q. What about Mr. Eaton's colleague from Cleveland? A. Cyrus Eaton, Junior, did not come on the board until March 9, 1953. Mr. William Daley and Mr. LeFevre did not come on the board until May 12, 1953. And Mr. Robert Kaiser did not come on the board until May 13, 1958.

Q. 1958. Are they associated at Cleveland with Mr. Eaton? A. Yes, in some respects.

Q. And the contract with United Mine Workers was made in 1954? A. That is right.

Testimony of Mark E. Eastin

Q. When did Mr. Eaton become chairman of the Board?

A. Mr. Eaton became chairman of the board May 12, 1953.

Mr. Rowntree: That is all.

3113 Mr. Kramer: Now, your Honor, I want to read from the annual report of West Kentucky which has just been filed as Exhibit 172, reading from page 3.

The Court: Yes, sir.

Mr. Kramer: Where it compares between 1950 and 1951 figures.

1951 production from your company's properties amount to 5,513,890 tons comparing with 6,465,136 tons in 1950.

That tonnage is not in an exhibit we gave but it is set out here.

The decrease in production in 1951 was reflected in a reduction in total sales which amount to, in 1951, 5,466,189 tons compared with 6,473,135 tons in 1950.

3114

(Witness excused.)

Mr. Kramer: We have a deposition, your Honor, that we want to read here. We are not going to read it all, a portion of it. Mr. Combs and Mr. Rayson will read.

Mr. Combs: May it please the Court and ladies and gentlemen of the jury, I would like to read some excerpts from the deposition taken on pre-trial of Mr. R. E. Phillips, September 14th, 1960.

I might say, for purpose of clarification to the Court and jury, that the part of the deposition we are reading has a bearing on the testimony of Mr. Phillips in regard to an alleged agreement that he had with Ed Daniel, that Ed Daniel told him that he could pay what he wanted to on the welfare fund, what he could, and that as far as wages were concerned that he could work that out among his men.

All these excerpts of the deposition have to do with that particular point.

Deposition of R. E. Phillips

3115

R. E. PHILLIPS

being first duly sworn, was examined and deposed as follows:

CROSS EXAMINATION

By Mr. Combs:

(The deposition was read as follows:)

"Q. Explain to me what you mean you haven't had all the work you can do? "A. Well, we could have expanded and we had the orders.

"Q. You had the orders? "A. Yes, sir.

"Q. I misunderstood, I thought you said you didn't have the orders. Now you say you had orders. "A. As far as long-term contracts, we never had no long-term contracts with anyone. But through our broker has always been able to handle our coal.

"Q. But you didn't expand, is that right? "A. We expanded some, but not as much as we wanted to.

"Q. Why didn't you expand? "A. That's a good question.

"Q. Was that just something you decided among yourselves or did the union have something to do with that? "A. Well, the union had a little to do with that.

"Q. Tell us about that. "A. We was afraid to
3116 expand because we didn't know — we knew we couldn't pay no 40 cents a ton. We knew that, before we even signed any kind of a contract. And we was afraid would happen just what has happened.

"Q. What has happened? "A. The union thinks that we owe them a lot of money.

"Q. And you mean you were afraid a lawsuit would be brought by the welfare fund? "A. Through the union, yes.

"Q. In other words, you were afraid that your agreement with Ed Daniel wasn't so good; is that right? "A. Well, I questioned it.

"Q. Did you ever seek to get some sort of confirmation of that? "A. I did not.

"Q. Did you ever consider going over and talking to one of the district officers and seeing what the higher-ups would say about an agreement such as was made? "A. I thought about it, but we never did go.

"Q. Why didn't you? "A. Just didn't go.

"Q. Did you have any reason for not going? Why didn't you go? "A. I didn't have no reason for not going. We just failed to go.

3117 "Q. You were over there one day. "A. He was their representative. I thought he would handle it on that end.

"Q. If you didn't have any worries about it — evidently you did have some worries about it. "A. We didn't get anything in writing.

"Q. Did you mention it to Albert Pass the day you were over there, discussed the thing with him? You were over there one day. "A. We was over there, but we didn't discuss that with him."

(End of reading of deposition.)

3118 ELLIOTT D. ADAMS
called as a witness by and on behalf of the cross-defendant.

DIRECT EXAMINATION

By Mr. Rayson:

Q. I believe you are Elliott Adams; is that correct? A. Yes, sir.

Q. What is your business, Mr. Adams? A. I am a certified public accountant and attorney-at-law.

Q. Have you at our request examined three books, which are the Exhibits 7, 6 and 3 in this case, and which purport to be the records of the Phillips Brothers Coal Company? A. Yes, sir.

3119 Q. Did you for the years 1955, 1957 and 1958 total the number of tons shown as rail tons and total the

Testimony of Elliott D. Adams

number of tons shown as truck tons in those books? A. Yes, sir.

Q. And did you also for those years total the receipts for rail tons and total the receipts for truck tons? A. I totalled the dollars shown as to what they got for it. Some of them were not extended.

Q. What did you do with respect to the year 1956? A. Exhibit 22 showed the tons and realization for rail tonnage and the testimony showed the total tonnage. So I took the rail tonnage and total tonnage and took the difference to be truck tonnage.

Q. I see. You did that for that one year? A. Yes, sir.

Q. Are the records available for that year? A. I didn't see any.

Q. In the books. A. No, sir.

Q. On the basis of that information do you have prepared an exhibit showing the total tonnage shipped by rail by Phillips Brothers for each of the four years in 1955 through 1958, the average price of that rail coal, the 3119a total of all coal mined by Phillips, the average price of all of Phillips' coal? A. Yes, sir.

3120 Mr. Rayson: Your Honor, we would like to introduce this as an exhibit to this witness' testimony. (Exhibit No. 173 was marked for identification and filed.)

Mr. Rayson: Before going further with the witness, your Honor, I would call attention to the last column on the right-hand side of the page entitled National Average Price Strip Mined Coal.

On yesterday we read from Exhibit 116, from page 89 of that booklet showing the national average price for strip mined coal for the years 1957 and 1958. I would now read from page 125 of the 1957 Minerals Yearbook, Volume 2, published by the United States Department of the Interior, and I have discussed this book with counsel, opposing counsel this morning, indicating the national average price for strip mines for the years 1955 and 1956.

The strip mine national average for the year 1956 was

\$3.74. That is the figure shown under that column at the right-hand of the page. For 1955, and I now read from page 107 of the 1956 Minerals Yearbook, the national average price for strip mined coal in that year was \$3.48.

We do not file these books, but we make them available for examination by opposing counsel.

3121 By Mr. Rayson:

Q. Mr. Adams, does this figure of 33,898, does this figure indicate the total amount of coal produced by Phillips in 1955? A. I would say shipped, delivered.

Q. Shipped. A. Probably.

Q. And this is the figure shown by their books as you found it? A. Yes, sir.

Q. Is this 23,985, is this the total amount shipped by rail? A. Yes, sir.

Q. The \$3.35, is that the average price of the coal shipped by rail, the 23,985 tons? A. Yes, sir.

Mr. Rayson: Your Honor, this figure, \$3.35, and the figures in this column are the figures which the cross-

3122 plaintiffs have previously shown in other exhibits. By Mr. Rayson:

Q. Now did you add the receipts which Phillips Brothers received from the sale of rail coal to the sale that they received from their other coal? A. Those were the records of what they had down there for the monthly sales.

Q. What were the total receipts shown by Phillips on its books for all coal that is sold in the year 1955? A. \$133, 109.55.

Q. What was the average price that Phillips received from all of its coal per ton? A. \$3.93.

Mr. Rayson: Now, your Honor, we call attention to the fact that the average price which Phillips received for its coal on a tonnage basis, and that is taking all of its coal, is above the national average price for strip mined coal for the year 1955.

By Mr. Rayson:

Testimony of Elliott D. Adams

Q. Now did you make a similar computation for the year 1956, Mr. Adams? A. I had nothing to go by for 1956, except the testimony.

Q. And by the testimony, you mean the total number of tons sold? A. That is correct, and the dollars gotten for it and the amount of rail tonnage and the amount of rail proceeds, billings.

Q. Very well. From that basis, were you able to determine the average price which Phillips received from all of its coal? A. The average price, according to those figures for total shipments was \$4.59 a ton.

Mr. Rayson: I would call attention, your Honor, to the fact that this is above the national average for that year for strip mined coal.

By Mr. Rayson:

Q. Did you make a similar computation, Mr. Adams, for the year 1957? A. Yes, sir, I did. I had the record on that.

Q. And what average price per ton did Phillips receive for all coal in that year? A. \$3.63 1/3. \$3.63 1/3.

Mr. Rayson: And here we would point out that this price is 25 and a fraction cents below the national average for strip mined coal in the year 1957.

By Mr. Rayson:

Q. And for 1958, did you make a similar computation, Mr. Adams? A. Yes, sir.

3124 Q. Did you conclude that the average price that Phillips received for all coal in that year was \$3.72? A. That is correct.

Mr. Rayson: Your Honor, I would call attention that this is 8 cents below the national average for strip mined coal in that year.

I would further point out that for the years 1955 and 1956 that this chart indicates that the average price of Phillips Coal was \$1.30 ahead of the national average for those two years; he was 34 cents below — that is for the combined years, for '57 and '58.

Cross examine.

*Testimony of Elliott D. Adams***CROSS EXAMINATION**

By Mr. Rowntree:

Q. Mr. Adams, do your computations with respect to rail coal confirm substantially this Exhibit No. 22 so far as the figures on your exhibit are concerned? A. They agree exactly. The amounts vary somewhat. We discovered some mistakes in addition on there.

Q. I believe there is a two cents error on the 1955 average rail price. We have it on there \$3.37½. A. \$3.37½, that is right.

Q. Is that right? A. Yes, sir. No. For rail?

3125 Q. Yes. A. No, \$3.35.

Q. \$3.35. A. That is for 1955.

Q. So the exhibit is 2½ cents off on '55. But the other years are the correct average price? A. Yes, sir.

3126 Q. Are you an expert in the coal business? A. Well, I was office manager and credit manager for a wholesaler for 12 years. And I have made up tax returns, cost sheets for the coal associations, Southern Appalachian and also Harlan, a number of years back. I still have about five producers and wholesalers of coal for whom I do the tax and accounting work.

Q. Would you say that the domestic market for coal has greatly declined in this country? A. Practically negligible.

Q. Most coal companies have very little domestic market? A. That is correct.

Q. But if the truck coal of Phillips Brothers Coal Company goes to the domestic market, then is it not true that Phillips Brothers has a very substantial domestic market for coal? A. I wouldn't say that 3,800 tons or 10,000 tons a year was a substantial domestic market.

Q. But it is a very substantial domestic market for a company that puts out 25 to 35 thousand tons a year, is it not, Mr. Adams? A. Yes, that is a pretty high per-
3127 centage.

Q. Yes, sir. Now are you familiar with the type

Testimony of Welly K. Hopkins

of market that has been affected by the shipments of coal into the Tennessee Valley from outside? A. You mean steam market?

Q. Yes, sir. A. That is substantially all there is.

Q. And so the shipments of coal from outside coming to the Tennessee Valley market affect the steam market of coal, is that not true? A. I would say so, yes, sir.

3128 Q. But the domestic market is something apart from that, it being not the market at which these large tonnages are coming into the valley? A. That's correct.

* * * * *

3131 WELLY K. HOPKINS

a witness called by and in behalf of the Cross-Defendants.

* * * * *

DIRECT EXAMINATION

By Mr. Combs:

Q. Will you please state your name and your address to the jury? A. My name is Welly, W-E-L-L-Y, K. Hopkins. I reside in Washington, D. C. at my office address, and my home or residence is in Alexandria, Virginia.

Q. What position do you hold with the United Mine Workers, Mr. Hopkins? A. I am its senior counsel, Mr.

3132 Combs, and have been since twenty-one years ago this month.

Q. Would you state briefly your professional background, Mr. Hopkins? A. Well, sir, I was born and reared in the southwest Texas country town, and there started practicing law in 1923.

Prior to that time, I — after finishing preparatory school, I spent six years on a ranch, Judge, and spent three or four months in the Army in 1918, and received my license to practice law by being admitted to the Bar in July, 1923, after three years attendance at the University of Texas.

After thirteen years, I believe, approximating that, prac-

Testimony of Welly K. Hopkins

tice in that part of the State, I came to Washington, D. C., in the spring of 1936, as a special assistant to the Attorney General of the United States, then Homer Cummings, in charge of the trial section of the criminal division of the Department of Justice.

I spent four years there, and resigned to become the senior counsel of the Mine Workers of America in May, 1940.

3133 Q. Now, Mr. Hopkins, I believe you said you went with the United Mine Workers as their senior counsel in the year 1941. A. 1940.

3134 Q. And have you participated in, as counsel, the wage negotiations that the United Mine Workers have had with the operators since that time? A. Yes, sir, I have, Mr. Combs, beginning in 1943, which was the expiration date of the 1941 contract.

3135 Q. Now for clarification, I believe the 1941 contract was known as the Southern Wage Agreement, the 1941 so-called Captive Mines Contract, the 1943 Six-day Work Week, and the 1943 contract, there was a contract known as the First Illinois Agreement, 1943; a contract known as the Second Illinois Agreement, 1943; this Illinois Agreement went into — was carried forward into the so-called Ickes-Lewis Agreement, 1943; this agreement was modified by the agreement of December 17th, 1943; then these agreements as modified by the terms of

3136 the contracts were carried over and became the 1945 agreement; the 1946, the Government seizure, we have what is known as the Krug-Lewis agreement; then the next agreement was 1947 Bituminous Coal Wage Agreement which carried forward as modified the previous enumerated agreements, and then there was the Bituminous Coal Wage Agreement of 1948.

Now getting down to the terms of the 1948 contract, Mr. Hopkins, what happened with reference to the 1948 con-

Testimony of Welly K. Hopkins

tract? A. Mr. Combs, I think the chronology that you have stated is substantially correct. As to the first Illinois agreement, it did not become a part of the 1943 Ickes-Lewis agreement because it was superceded by the second Illinois agreement. It, however, received the precise approval of the then War Labor Board, and the Ickes-Lewis agreement, by Presidential directive, was founded upon the second Illinois agreement and became a part of the Ickes-Lewis agreement.

The part thereafter as given in your chronology is correct.

You asked me what happened to the 1948 agreement?

Q. Yes. I might, for clarification to the Court and Jury, ask you this question. The 1948 agreement was the 3137 agreement in force and effect before the 1950 contract? A. It was; yes, sir.

Q. Now would you tell the Court and jury how the 1948 contract was terminated. A. Yes, sir.

By its terms there was a right on the part of any signatory operator or the union to terminate it on 30-day notice, on or after June 30, 1949. And the Southern Coal Producers Association, one of the signatories to the agreement, gave notice of termination, as I recall, in late April, 1949. And thereafter the union, as the other signatory to the agreement, gave notice of termination to the remaining commercial operators as represented by what is known as the Northern Coal Conference, and a notice of termination to what is known as the Captive Coal Group. That is the group that produce and use their own coal and are not in the commercial field.

Whereupon, the conferences as required under the notices as given were assembled beginning in May, 1949.

There were three in number. The first conference assembled at Bluefield, West Virginia, I believe. The second assembled at White Sulphur Springs, West Virginia, and the third was likewise held there. That is the captive

Testimony of Welly K. Hopkins

conference, it having had one initial, their first meeting, at Philadelphia in late May of 1949.

3138 Thereafter, the conferences, as thus constituted, continued their negotiations until they were terminated by the operators walking out of the conference over the objection of the mine workers on or about November 2, 1949. I believe that is the approximate date.

As to the conferences at White Sulphur Springs, they met something like 40 or 45—about 25 or 30 different days. At Bluefield I think they were in session somewhere around 40 or 45 days. The captive mine conference that was being conducted at White Sulphur, met intermittently. I would estimate from 18 or 20 different times.

The conferences failing to achieve a contract led to the filing of numerous unfair labor practice charges against the International Union and its president, beginning on or about, as I recall, December 28, 1949. There were five different groups of charges. Some 50-odd different coal associations and/or companies being the charging parties.

They were filed with the general counsel of the National Labor Relations Board, and on January 18th, 1950, as I recall, the then general counsel of the Board authorized the issuance of complaints based upon those several charges and consolidated them for hearing.

At the same time, the general counsel, acting
3139 through a man by the name of Penello, who is a regional director for the Labor Board in Baltimore, Washington being in that jurisdiction, on behalf of the Board and in the name of the general counsel, filed a petition for an injunction against the International Union and its president, Mr. Lewis, in the Federal District Court of the District of Columbia at Washington, alleging the named defendants, union and its president, by the violation of certain sections of the Taft-Hartley Act, in that they alleged that they were guilty of unfair labor practices as spelled out in the petition.

The petition—I hold a copy, or a certified copy of it

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in my hand—certified by the District Clerk in the cause known as John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, on behalf of the Board, Petitioner, versus, International Union, United Mine Workers of America, and its president, John L. Lewis, Respondents, No. 275-50, filed January 18, 1950.

It prayed for an injunction as against the named defendants—reading from the prayer of the petition as filed—that the Court enjoin and restrain respondents, and each of them, from:

“1. Insisting that any collective bargaining agreement with the employers provide as a condition of employment that all of the employees of said coal operators, included among and represented by said Employers, and each of them, become and remain members of respondent United Mine Workers of America, without compliance by respondent United Mine Workers” of the Act.

“2. By insisting that any collective bargaining agreement with the employers contain a so-called welfare and retirement fund to be administered so as to provide benefits therefrom for members of respondent UMW only..

“3. By insisting that any collective bargaining agreement with the employers contain such provisions as are so-called ‘able and willing’ and ‘memorial period’ clauses contained in prior agreements.”

I might say there, your Honor, that those points as referred to were sections that had been contained in the 1948 agreement and were a subject of dispute in controversy in the bargaining sessions to which I have averted.

On February 11, Judge Richmond B. Ketch, in the same case, he being the judge presiding in the district case, issued an injunction and restrained the union as prayed for in the petition.

I hold in my hand a certified copy of such court order filed February 11.

Q. Mr. Hopkins, about this time did President Truman appoint a fact finding board to investigate this dispute?
A. He did, Mr. Combs.

Q. Would you describe briefly— A. Yes, sir, I will in just a second. It was a fact finding board—not a fact finding board, but a board of inquiry appointed by the President under executive order No. 10106, on February 6, 1950, naming as the board Mr. W. Willard Wertz, who was then I believe connected with the University of Wisconsin and is now Under-Secretary of Labor in the present administration, a Mr. John T. Dunlop, who is associated with Harvard University, and Mr. David L. Cole, an attorney and arbitrator from Patterson, New Jersey, I believe. They were appointed and under their auspices several meetings were had by the parties with that board.

Simultaneously with the issuance of the injunction just referred to, Mr. Combs, there was another injunction. I don't know whether you have inquired about that or not.

Q. Yes. Would you tell us about that? I think that was the injunction sought by the Attorney General? A. It was. Based upon the report, the preliminary report at least of this board of inquiry, as appointed by President Truman, the President, upon receipt of that report, authorized and directed the Attorney General of the United States in the name of the United States to file a petition for an injunction in the District Court of the District of Columbia, to restrain the union and the named other defendants, a list of approximately 108 or 110 coal companies and associations, alleging that there was in existence a labor dispute between the named defendants, and calling upon them to collectively bargain out the dispute.

3143 I believe, holding in my hand that petition, which is styled United States of America v. International Union, United Mine Workers of America, et al, as defendants, No. 683-50, filed on February 11, 1950—

Q. May I ask one question there, Mr. Hopkins, did this restraining order or injunction that you have referred to insofar as the operator defendants were concerned, did that include both the northern and southern operators in the restraining order? A. Mr. Combs, it did. It named the various and sundry associations and a long list of individual companies. For instance, Southern Coal Producers Association, as well as the other associations, Southern Appalachian Coal Producers Association, Southern Tennessee Coal Producers Association, Tennessee Products and Chemical Corporation, Tennessee Consolidated Coal Company, Whitwell Coal Corporation, and a whole list of over a hundred others. They were all named as defendants, and under Section 4 of the petition, appearing on page nine of the petition, the petition said that this court—they were praying that this court—I am quoting: "That this court order the defendants to engage in free collective bargaining in good faith for the purpose of resolving their disputes and to make every effort to adjust and settle their differences as contemplated by the National Emergency Provisions of the Labor Management Relations Act of 1947."

3144 And on that day a temporary restraining order, ex parte, that is without notice, was issued by the district court granting the restraints as prayed for against the named defendants.

Q. Mr. Hopkins, I take it that the two restraining orders you are talking about issued on the same day, the first one that you testified about was the one restraining the union from making demands with relation to those items that you read there, including the union shop issue? A. Yes, sir.

Q. And then this restraining order that you are talking about was issued on the same day ordering the parties to bargain but the dispute they had? A. Yes, the first being issued at the behest of the National Labor Relations

Board and the second at the behest of the Attorney General of the United States.

Q. Would you tell the Court and jury then what happened? A. Well, under the scrutiny of the federal court and in compliance with orders of those two injunctions, and under the surveillance, if you want to put it that way, of the Labor Board that it sought the first injunction, and with the Attorney General as the petitioner in the second watching the negotiations, the parties continued to negotiate with the assistance at sometimes of the members of the board of inquiry and the mine workers representatives, your Honor, in accordance with those orders in commands of the injunction, negotiated in accordance therewith, and a contract was achieved on the 5th of March, 1950, that eliminated the so-called able and willing clause that had been in the '48 agreement that was one of the points of controversy and involved in the charges that it brought in the petition, amended the memorial period to allow only five days in any one year after notice. It amended that section of the preceding 1948 contract that had been in controversy in reference to the payment of welfare fund benefits to members of the union, so as to provide in the 1950 agreement payable to the employees of the employers who were contributing.

It likewise, under the same scrutiny of the officials involved, amended the union security clause so as to add the words "in the manner and to the extent permitted by law." That was added to the 1950 contract and it was executed by the parties, as I recall on Sunday, March 6, becoming effective as of midnight March 5.

That was the result of the bargaining under those conditions on the points enumerated that had been involved in the injunctions that resulted in the National Bituminous Coal Wage Agreement of 1950.

Q. Now, Mr. Hopkins, what became of the restraining order secured by the Attorney General? What eventually became of that restraining order?

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A. Well, Mr. Combs, it was eventually dismissed. But subsequent to the injunctions and the contract I have outlined, there were proceedings had under the Taft-Hartley Act on the charges as set out in the complaint that Penello obtained under the first injunction.

3147 Q. Yes, but let's handle one of the injunctions at a time. A. All right, sir.

Q. Let's talk now specifically about the restraining order that was issued ordering the parties, including all of this group of operators, to bargain with reference to that dispute. A. Yes, sir. On—I want to turn to it. I have in my files somewhere a copy of the order.

Here it is.

On the 10th of October, 1951, in cause number 27550, being the first injunction, the Labor Board moved and Judge Ketch, the issuing judge of the original preliminary injunction, granted the dismissal of that injunction.

It reads as follows:

"A temporary injunction having been entered in the above-entitled proceedings enjoining and restraining respondents, International Union, United Mine Workers of America and its agent John L. Lewis, from engaging in certain acts and conduct set forth therein, pending final adjudication of the National Labor Relations Board with respect to such matters; and

"It appearing to the Court that a trial examiner of the Board has issued his Intermediate Report and recommended order in International Union, United Mine Workers of America and John L. Lewis, its president, Case Nos. 5-CB-43 to 5-CB-47, inclusive and that the Board—"

And I interpolate, these being the same ones that were involved in the consolidated complaint on which that injunction had originally issued.

"—and that the Board—"

Continuing.

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"—and that the Board, having been advised that respondents are in compliance with said recommended order, has closed said proceedings before it, it is therefore

"ORDERED, ADJUDGED AND DECREED that the temporary injunction ordered by this Court in this matter on February 11, 1950, be, and the same hereby is, vacated.

"Done at Washington, D. C. this 10th day of October, 1951."

Mr. Combs: If Your Honor please, we would like to introduce that as Exhibit.

3149 (Exhibit No. 174 was marked for identification and filed.)

By Mr. Combs:

Q. Mr. Hopkins, did you receive letters of compliance from the National Labor Relations Board in connection with the order they issued? A. Yes, sir, after we complied therewith, in the spring of 1951, we did receive two letters of compliance, they arising in this fashion:

There had been an Unfair Labor Practice charge filed against the union in 1948 by some of the operators that had gone to final judgment through the Board, the Circuit Court of Appeals, and certiorari in the Supreme Court of the United States being refused in February, 1951, that being but a short time after the filing of the report by the trial examiner in the other cases that had arisen, as I said, under the first injunction in January, 1950.

Compliance was had by the union in both of those cases, and on August the 9th, 1951, I hold in my hand the copy of the—photostatic copy of a letter from the National Labor Relations Board addressed to me, 900 15th Street,

Washington, D. C., RE: International Union, United
3150 Mine Workers of America, et al, Case Number

5-CB-14, that being the number of the case that had arisen in 1948 involving the union security clause.

Reading: "Gentlemen:"

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This addressed to you, Mr. Combs, and Mr. Owens and myself jointly.

"Gentlemen:

"The regional director of the National Labor Relations Board, having advised the Board that the respondent is in compliance with the Court decree in the above matter, the case is hereby closed.

"Very truly yours,

"Frank M. Kleiler

"Executive Secretary"

With copies to all parties including Mr. Penello, the regional director in Baltimore.

On August the 10th, 1951, I hold in my hand a photostatic copy of a letter written to International Union, United Mine Workers of America, and its president John L. Lewis, 900 15th Street, Northwest, Washington, D. C., RE: United Mine Workers of America, Cases Number 5-CB-43 through 5-CB-47, they being the consolidated charges, ladies and gentlemen of the jury, that were involved in the first injunction issued on February 11th, at the behest of the Labor Board that I have described to you.

3151 That letter reads as follows:

"Gentlemen:

"The regional director of the National Labor Relations Board, having advised the Board that the respondent is in compliance with the intermediate report in the above matter, the case is hereby closed.

"Very truly yours,

"Frank M. Kleiler

"Executive Secretary."

Copies to all parties, including Mr. Penello,

Mr. Combs: May it please the Court, we don't desire to introduce that as an exhibit unless counsel would like to have in there. We don't have very many copies of it.

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Mr. Kramer: It's read into the record, so it is a part of the record.

The Court: All right.

By Mr. Combs:

Q. Mr. Hopkins, what became of the injunction issued at the behest of the Attorney General in respect to the emergency that you referred to? A. Mr. Combs, I hold in my hand a photostatic copy of a motion for discharge of the preliminary injunction filed in that case, number 68350, by the Attorney General of the United States, 3152 on August the 29th, 1951.

It reads as follows:

"MOTION FOR DISCHARGE OF PRELIMINARY INJUNCTION"

That being the one, ladies and gentlemen, that was issued also on February 11, 1950, at the behest of the Attorney General, acting under the President of the United States.

"The United States of America, by the Attorney General of the United States, moves to discharge the Preliminary Injunction issued and entered herein on March 3, 1950, and represents to the Court as follows:

"1. The action in which the injunction was issued was commenced by the United States of America on February 11, 1950, pursuant to the provisions of Section 208 of the Labor Management Relations Act, 1947 (29 U.S.C. 178). The defendants were (a) International Union, United Mine Workers of America, and its president, and (b) numerous bituminous coal operators and associations of operators signatory to the National Bituminous Coal Wage Agreement of 1948. The purpose of the action and of the Preliminary Injunction issued therein on March 3, 1950— and I interpolate to say, gentlemen, that the temporary restraining order, that is the first action, was issued on February 11th, and the preliminary injunction based 3153 upon that restraining order was dated March the 3rd, and that is what is referred to here, it having

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taken the place in the legal sense of the temporary restraining order.

Continuing:

"—issued on plaintiff's motion was to restore normal operation and production in the bituminous coal industry of the United States, such production having virtually ceased as the result of a work stoppage in the said industry that commenced on or about February 6, 1950 due to unresolved labor disputes between the signatories to the National Bituminous Coal Wage Agreement of 1948 which had expired on June 30, 1949. The Preliminary Injunction was directed against all defendants in the action and its fundamental provisions enjoined the International Union and its officers from continuing the strike then in existence in the bituminous coal mines in the United States and enjoined the other defendants from encouraging, causing or engaging in a lockout in the said mines.

"2. The Preliminary Injunction entered by this Court on March 3, 1950 provided in the last paragraph thereof that it shall 'be and remain in full force and effect until the further order of this Court.'

"3. On or about March 5, 1950 the parties to the 3154 labor disputes agreed to a settlement of their differences, which settlement was followed shortly thereafter by the return to their employment of the employees in the bituminous coal industry represented by the International Union, United Mine Workers of America. In consequence thereof normal production of bituminous coal was restored within a short time after March 5, 1950, and the national emergency which gave rise to the injunctive proceedings herein ceased to exist."

Then it recites Section 210 of the Labor Management Relations Act, that makes it, the duty of the government, quote:

"Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge

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the injunction, which motion shall then be granted and the injunction discharged."

"The balloting contemplated by the said section and the preceding section of the Act did not take place but, as above stated, a settlement of the labor disputes between the parties thereto, defendants in the instant action, was reached on or about March 5, 1950."

Then it recites an appeal motion filed by the representatives of the government for the—to the Circuit 3154a Court of Appeals, asking leave to discharge in injunction, and the Circuit Court referred it back to the District Court so it winds up by the prayer:

"WHEREFORE, the plaintiff United States of America prays for an order discharging the Preliminary Injunction issued by this Court on March 3, 1950, and for such other, further and different relief as the Court may deem just and proper.

"Signed J. Howard McGrath

"Attorney General

"By: Homes Baldridge

"Assistant Attorney General

"George Morris Fay

"United States Attorney"

Based upon that motion to vacate, I hold in my hand a certified copy in the same case of an order filed on September the 12th, 1951, reading as follows:

"This cause having come on to be heard on September 12, 1951, on the motion of the United States of America for the discharge of the preliminary injunction, and it appearing to the Court that the entire controversy has become moot, it is this the 12th day of September, 1951,

"ORDERED that the preliminary injunction entered in this action on March 3, 1950, be and the same is 3155 hereby discharged, and it is further

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"ORDERED that the action be and the same is hereby dismissed without costs.

"Signed Edward W. -----

"District Judge"

Q. Now, Mr. Hopkins, these restraining orders and charges that you are talking about started prior to the execution of the 1950 contract, it had to do with the dispute that arose between the parties with reference to a successor contract of 1948 contract, and then the letter orders of dismissal had to do with the action of the same Court proceedings and Labor Board proceedings after the execution in 19— A. That is correct, the contract was executed on March the 5th; the injunction obtained on February the 11th by the Labor Board; was discharged by separate order in 1951.

The National Emergency injunction was on motion of the Government dismissed in 1951, on September 12th, as I have just read, all subsequent to the contract of 1950, which was achieved after the issuance of the first two injunctions.

Mr. Combs: May it please the Court, we have read the parts that we want in the record of those proceedings, and we have them here. We have no desire to introduce them, but they are available for counsel or the Court 3156 if they would like a copy.

By Mr. Combs:

Q. Now, Mr. Hopkins, you refer to questions relating to the union shop clause as being a question that was involved in the Labor Board charges. That union shop clause, I take it from your testimony, was in the 1948 contract? A. Yes, sir.

Q. Which you have described its termination. A. Yes, sir.

Q. I would like to ask you, please, if you would give a brief history of the union shop clause preceding the 1950 contract, and the clause that is contained in the 1950 con-

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tracts. A. Well, Mr. Combs, I'd be glad to try to do that, sir, as nearly chronologically as I can.

3157 The 1941 agreements, they were two in number, called the Appalachian and the Southern agreements, expired by their terms on, I believe, March 30, 1943.

In those 1941 agreements the union security clause was provided for by a memorandum, an explanatory memorandum that was incorporated in those contracts, that said "With reference to the sentence in the enabling clause stating that all employees shall 'be' members of the United Mine Workers of America, the word 'be' is used in its future tense, and the clause so noted becomes effective and operative after an individual has been employed and starts to work."

Now that clause, so worded, remained in the contract, was carried forward by reference in the second Illinois contract heretofore referred to, that became the basis of the Ickes-Lewis agreement, and was carried forward by reference of the Ickes-Lewis agreement, November 3, 1943, into the contract that was executed by the operators and the mine workers on December 17, 1943, the basis of that being the Ickes-Lewis agreement; the National Bituminous Coal Wage Agreement of 1945, was carried forward into that; carried forward by reference into the Krug-Lewis agreement of May 29, 1946, which was an agreement reached between the mine workers and the Secretary of the Interior acting under Presidential direction in 1946, and was carried forward into that contract.

3158 Now in 1947, the explanatory note that I have referred to, your Honor, came into the 1947 contract, and reads as follows in its enabling clause.

Mr. Combs: While Mr. Hopkins is looking that up, I might say the contracts that he has referred to are contained in the pamphlet—I think it is Exhibit 77 here.

A. (Continuing) The wording: "It is further agreed, that as a condition of employment all employees shall be, or become, members of the United Mine Workers of Amer-

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ica, except in those exempted classifications of employment as hereinafter provided in this Agreement."

Those exempted classifications being in the nature of supervisory personnel or management employees.

So that is the wording in 1947, and that is the wording, your Honor, that was in the contract expiring in 1948. And in 1948, the negotiations leading to that contract, had, among other things involved, the question of the union security clause as I have described it, whether or not it would be carried forward into the 1948 agreement. There was much dispute over it and argument.

Finally, the contract of 1948 was signed with the wording just as I have read it from the 1947 agreement and the parties, the operators that is, and the union, agreed by stipulation under the auspices of the Federal 3159 District Judge of the District of Columbia, that the question involved in it as to whether or not it was in conformity with the Taft-Hartley Act would be litigated.

The stipulation that was filed with the court by the parties on July 13, 1948 read that the contract included that clause was to be operative to June 30, 1949 "subject to final decision of the Court of the last resort."

Whereupon, the contract came into effect, Mr. Combs, and it was litigated and processed in due order, that is, the question of whether or not the union security clause was violative of the law of whether or not the mine workers were guilty of an unfair labor practice in demanding it in the negotiations.

Q. I take it, Mr. Hopkins, that this question arose because of the enactment of the Taft-Hartley Act in 1947?

A. It did. There had been no question about the clause prior to Taft-Hartley, Mr. Combs, and it arose only because of the enactment of the Taft-Hartley Act.

I might say there, your Honor, that the Taft-Hartley Act, as I recall, was enacted by the Congress in June, 1947, but did not become effective until late August, 1947; there

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fore, the contract of 1947 was not within the ban of the act at all, but in 1948 it was involved as to whether 3160 or not it was in conformity with the Act.

During the 1948 negotiations, I should like to refer to the fact that during those negotiations the operator representatives in collective bargaining sessions, in discussing the question of the union shop, made a proposal, and I should like to read it, your Honor, as quoted in the petition for injunction. That is the first injunction, we call the Penello injunction that was filed on February 11, 1950.

Among other allegation as made by the plaintiff based upon the operators' charges is the following:—I read from Section (e), page 6 of the petition:

“In June 1948 in anticipation of the expiration of the said Agreement, the signatories thereto met to negotiate a new collective bargaining agreement to succeed the said Agreement of 1947.

“(f) In the course of said negotiations for a new agreement, the representatives of the Employers submitted to respondents a written statement concerning terms for a new collective bargaining agreement, including therein, the following statement with respect to the unionship provision of the said Agreement of 1947:” “—this is their written statement.

““Our present contract contains a union shop provision. Because of the Labor-Management Relations Act, 3161 1947, this provision cannot be carried into the new agreement without first following the requirements of the law. This means that before any such clause can be made effective, the National Labor Relations Board must certify that at least a majority have voted to authorize the union to make such an agreement. The operators, however, are willing to insert into the contract a union shop provision to become effective when and to the extent permitted by law.”—

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Continuing to read sub-division (g) from the same page:

"Thereafter the Employers and respondents reached an agreement with respect to all conditions and terms of employment, but not including an agreement on a union shop provision for the new contract in conformity with the Act."

Q. Now, Mr. Hopkins, this occurred at what time, did you say, this particular question? A. This was during negotiations for the 1948 contract, which, as I recall, was signed on the 25th of June, 1948, I believe. I can verify that in just a second. June 25, 1948; yes.

Now continuing the history of that clause. It was, 3162 of course, in litigation as I have previously related through the Board by the stipulation agreed to between the parties in July of 1948, through the Labor Board, through the Circuit Court of Appeals, and upon petition to the Supreme Court of the United States it became final and it was upon that that the mine workers undertook their compliance as I have previously related.

Q. Mr. Hopkins, if I can interrupt your line of thought I would like to make this one thing clear. This proceeding you are talking about being stipulated between the parties, referred to the captive mine group; is that correct? A. That is correct, and it involved the union security clause. That is in the captive mine case I refer to.

Q. The captive mine case, after the action of the Supreme Court, became the precedent for the National Labor Relations Board in what we know as the Leff opinion? A. The Leff opinion, as I recall, was as a result of the consolidated charges brought by the operators in December 1949 and January 1950, but it came out in December 1950; the last action in the captive mine case under the stipulation to litigate that clause came out in February, February 11, and the compliance was had in both of them by the union in the spring of 1951 and that was the compliance which was noted as I have related.

3163 Q. Thank you. A. The union security clause remained in the contract, as I have undertaken to

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describe, your Honor, and being the subject of the controversy and dispute leading to the two injunctions.

I hold in my hand a photostatic copy of a letter dated January 25th, 1950, on the letterhead of the Operators Negotiating Committee, National Bituminous Coal Wage Conference of 1949, and I suggest it here, Mr. Combs, because I have just related the operators' proposal in 1948 in reference to the union security clause, they offered a clause to the extent permitted by law—

Q. All right. A. This letter is dated Pittsburgh, Pennsylvania, January 25, 1950, addressed to Mr. John L. Lewis, President, International Union, United Mine Workers of America, Washington, D. C., dear sir.

Then it goes on to recite the fact that they offer a contract on certain terms—same hours, same high wages, and same so forth. But in Section 7, the final section of the letter, reads as follows, and I quote:—that is the last proposal that they make for a new contract—rather the last item in the new contract that they suggest be written into the agreement in 1950, as follows:

“The union shop as recognized in the coal industry
3164 may be included in such contract to the extent and
in the manner permitted by law.

“We request a prompt reply. Very truly yours, Operators Negotiating Committee, National Bituminous Coal Wage Conference of 1949, signed Frank R. Amos, chairman, J. William Wetter, Harvey Cartwright, T. J. Gerow, Hugh Lee, B. P. Manley, and the other name I can't make out.

That was before the issuance of the injunction of February 11, 1950, and upon that overture the mine workers representative undertook to negotiations for a period of a couple of days or so—I think around February 1 and 2, with the operators.

Having received this letter we requested bargaining conferences. They came to no avail. The Board of Inquiry

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then was formed on February 6th, as I have related. They made their first report to the President on February 11th, and I hold in my hand a photostatic copy of such report. I think I have referred to it before. It is a board appointed by President Truman. It is entitled "Report to the President", under date of February 11th.

And they undertake to recite, and do recite, the background of the dispute, giving the chronology of it, but as to the union shop controversy they first recite that on January 18th a District Court in Washington had been requested to grant an injunction restraining the
 3165 union from asking for the able and willing clause and the union shop, and so forth.

And on page 4 of this report, under the heading called "Stated positions of the parties", it says:

"The Union was demanding a wage rate increase . . . the Operators' position was a flat refusal . . .

"The Union was demanding an increase in the amount of the Operators' contribution to the welfare fund; the Operators refused to consider any increase at all." and
 so on.

3166 And then it goes down to non-wage issues included in these items, and gets down to this, and I am quoting:

"B. The union shop provision in the old contract. The operators maintained that the union shop provision had been held illegal by the National Labor Relations Board and that this provision would accordingly have to be dropped unless the union met the statutory requirements of the Labor Management Relations Act of 1947."

On page five from the same document they make the statement:

"The significant fact, which emerged from this inquiry, is that this is basically a dispute, at the present stage, over the wage and welfare fund contribution issues. Behind the tactical maneuverings of the negotiators is fundamentally an issue of dollars and cents. * * *

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"It is evident, however, from the bargaining which the board observed, that mutually acceptable terms covering these non-wage issues can be negotiated once the money issues are resolved. Responsible representatives of all the parties involved reflected this belief."

And that is the statement of the board of inquiry on February 11, prior to the negotiation of the contract achieved on March 5, 1950.

Now since 1950 that has been and now is the union security clause, your Honor.

Q. That is the wording that was inserted in the 1950 contract? A. That is the wording, and I should just like to read it at this juncture in its fullness so my testimony, I hope, will be complete upon that point:

"It is further agreed that as a condition of employment"—and I read from the printed copy of the 1950 agreement—"as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement."

Q. Now, Mr. Hopkins, I believe that since 1950 through 1958 there have been some five amendments to the 1950 contract? A. Mr. Combs, there has. The contract of 1951, the National Bituminous Coal Wage Agreement of that year, of 1952, of 1955, 1956, and 1958, all of which carried forward by precise reference that same wording of the union security clause that I have just read into the record.

Q. Unchanged? A. Unchanged.

Q. Mr. Hopkins, has that particular wording been before the courts since the 1950 contract was negotiated?
3168 Yes, sir, it has. I think a number of cases, Mr. Combs, as a matter of fact.

Q. All right. A. I can refer to them, I think, briefly, if you should like.

Q. Do you mind referring to just the particular decisions,

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not go into any detail? A. There is what is known as Fentress Coal Company case decided in 1958, which approves as legal and not violative of the statute the wording "to the extent and in the manner permitted by law" in the contract, decided in the Middle District of the District Court of Tennessee.

The Hixson Coal Company case in 1959 in the Western District of Arkansas, the Currins case in 1959 in Indiana, Southern District.

The Quality Coal Company case, which arose, as I recall, in Indiana and went before the Seventh Circuit Court at Chicago, in which a petition for certiorari was denied, in 1959 and 1960, the court there precisely holding that the quoted words were not violative of the statute and sustained the validity of the clause.

There has been, so far as I can recall no court has ever held that clause under that wording to be illegal or violative of the statute.

Q. Mr. Hopkins, are you familiar with certain 3169 charges before the National Labor Relations Board that were brought by the Progressive Mine Workers of America some time subsequent to the acquisition of Peabody Coal Company to the Millstadt and O'Fallon mines in Illinois? A. Yes, sir. I recall it. As I remember it, it arose in the fall of 1958 by charges being filed by the Progressive Mine Workers Union or some of its officials with the Labor Board, charging the Mine Workers International Union and its District 12, which is the State of Illinois, of being guilty of unfair labor practices and violative of the act, in reference to the two mines you have just enumerated, the Millstadt and what was the name of the other mine?

Q. O'Fallon mine. A. O'Fallon mine owned by the Peabody Coal Company in Illinois. Upon those charges hearings were had by an examiner. It went to the Labor Board. The board ruled and it went before the Seventh Circuit Court of Appeals in Chicago on the petition to review by

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the company, a petition to review by the union, and on a motion or petition on behalf of the board to enforce the order as laid down by the board and the examiner.

On the 2nd of December of this year the Seventh Circuit Court held in a written opinion, which is recorded, the citation of which I do not remember at the moment, it held precisely that this phrase, this union security clause, "to the extent and in the manner permitted by law," was not illegal, was not violative of the act, and it precisely reaffirmed its previous holding of the same clause in the Quality Coal Company case that had arisen in the State of Indiana and affirmed the wording in the Quality case, which said the qualifying phrase expressly modifies and limits the application of the clause relating to union membership so that any requirements it imposes is conditional on conformity to existing or future law and further it imposes no requirement as a condition of employment which would conflict with the Taft-Hartley Act or any other law.

Q. I was going to read excerpts—are you through? A. I was merely going to say, as a result of that opinion, there is now outstanding a decree of the Seventh Circuit Court of Appeals that says precisely that an election shall be held at Millstadt and O'Fallon mines under the auspices of the board and it shall be held at the earliest possible moment, and that whereupon the company will bargain with whoever wins the election and has been certified as the collective bargaining agent. That order is outstanding, that decree.

Mr. Combs: If it please the Court, I would like to read some brief excerpts from this case that we think are applicable to the issues raised here:

3171 This is the case of Perry Coal Company and Peabody Coal Company, et al v. National Labor Relations Board. There are two petitions, No. 12889 and No. 12915. This was decided by the Seventh Circuit Court December 2, 1960. I read from page 2a of the slip opinion:

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"The charging party is the Progressive Mine Workers of America. Among the sections of the Labor Management Relations Act claimed to have been violated are: Sections 8(a) (1); 8(a) (2); 8(a) (3); 8(a) (1) (A) and 8(b) (2)."

I read as follows:

"No employee of either of the coal mines hereinafter described complained of any coercion or discriminatory conduct. Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle.

"For many years prior to the summer of 1957, Progressive and its Local 167, represented employees of Midwest Radiant Corporation (Midwest) at the Millstadt mine, and Progressive and its Local 75 represented employees of Perry Coal Company (Perry) at the O'Fallon mine. This representation was accomplished by means of labor agreements between Progressive and its Locals 167 and 75 and Coal Producers Association of Illinois of which Perry and Midwest were members.

"For many years prior to the summer of 1957, Peabody, as a member of the Illinois Coal Operators Association, had recognized UMW as the exclusive bargaining representative at twenty-seven other mines which it owned and operated in Illinois and other parts of the country. The collective bargaining agreement included the National Bituminous Coal Wage Agreement of 1950 as amended, and the Wage Agreement and Working Conditions of District No. 12."

"Through a process of liquidation and merger occurring about October 3, 1957, the properties of Perry and Midwest became the properties of Peabody. The only employer now involved in these proceedings is Peabody.

"In May or June, 1957, which was after Peabody acquired control of the Millstadt and O'Fallon mines, Hugh

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White, president of UMW's District 12, notified Hartman, general mine superintendent of Peabody, and McCollum, a vice president of Peabody and formerly a vice president of Perry, that Peabody must comply with the provisions in the National Bituminous Coal Wage Agreement by 3173 recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines. His demand was not based upon a claim that District 12 represented any of the employees at these mines."

I might pause to interpolate that this was the letter that was introduced in this record that the court refers to of Mr. Hugh White.

"McCollum and Hartman agreed the contract applied to all Peabody operations, and stated that they would apply the contract as a matter of course when their contract with Progressive expired, and when UMW could show that it represented a majority of the employees."

I read from 6a of the slip opinion:

"The National Bituminous Coal Wage Agreement of 1950 contains the following provision: 'It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law'."

"The Board . . . held the Union security clause in the 1950 agreement provides for an unlawful closed shop in spite of the provision " . . . to the extent and in the manner provided by law." Such a holding is contrary to our 3174 decision in *Lewis v. Quality Coal Corporation*.

"The Board seeks first to distinguish *Quality* on the ground that that case involved private litigation. It then asks us to reconsider our decision in *Quality Coal*, and cites the same cases which this Court considered and rejected when it handed down the *Quality Coal* decision.

"It is entirely immaterial that *Quality Coal* arose in the context of private litigation. The question that was fully

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litigated in that case was decided adversely to the present position of the Board.

3175 "We decline the cordial invitation of the Board to abandon our decision in *Lewis v. Quality Coal Corporation*. We adhere to that decision. For whatever significance it may have, it also is of interest to note that the United States Supreme Court denied certiorari in *Quality Coal*, 361 U.S. 929.

"We are of the view and hold that the Board was in error in holding the 1941 agreement, which provided for a closed shop, was not amended or modified by the 1950 agreement. It seems clear that the contracting parties contemplated that changes might be necessary under the law, and evinced a desire to conform to such changes.

"The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights —

Mr. Rowntree: If Your Honor please —

Mr. Combs: " — under Section 7 — "

The Court: Wait just a minute.

Mr. Rowntree: That point right there it is our contention is a very important point. The sentence he just read.

Mr. Combs: Thank you. I will continue to read. I would like to start over on that quote, so it will be
3176 clear.

The Court: All right.

Mr. Combs: "The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights under Section 7 were violated. Further more in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment."

"In the instant case —"

Mr. Rowntree: It is our contention, Your Honor that the facts of this case must be applied to that law.

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Mr. Combs: Well, now, we are talking about two things, Your Honor. Here it would too.

We are talking also about the question of representation at those mines.

"In the instant case — "

I continue reading from page 10a of the slip opinion.

"In the instant case, no employee did lose his job in the change-over to UMW. No employee complained or testified that he was coerced into signing dues cards. There is clear evidence in the record that membership in 3177 UMW was not a condition of employment. Furthermore, at the time of the contract with Peabody, employees at both mines, by cards, and my election at O'Fallon, indicated their choice of United Mine Workers."

Mr. Robertson: Your Honor, we point out that we rely heavily on the statement of the Court that the employees were not coerced. In our case, we think the facts are quite different.

Mr. Combs: Your Honor, I think that the Court was talking about the question of insistence on the part — the charge of insistence on to the mine workers in relation to this. And of course I understand counsel's position to be that they are saying that the Court will look into the facts, but the question of per se violence was also before the Court, and the Court said it was not a per se violation, and I think that when we read the Fentriss case and the Miller cases that the question of going into the facts on a per se charge, that the Court is not holding that at all.

Now — and I want it still clear that we have not contended at any time that during the period of 1950 up to the repeal of the so-called reporting provisions of the Taft-Hartley Act that the union did have an effective union 3178 shop. That is what the Courts held. We didn't have that. What we are talking about is not in violation of the Act.

Counsel has been claiming that all the way down through

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that it is a per se violation, that the language itself is a per se violation, and the Court says it is not a per se violation.

Mr. Rowntree: We say that the language has to be interpreted by the acts of the parties in this specific case, just as the Court held in that case, and we have introduced the proof on that.

Of course, with respect to the Peabody matter, we say that the case there, out there, the question out there, the facts out there must be adjudged here on the proof in this record by the witnesses.

Now, I understand that counsel is reading this material here with respect to the question addressed to the witness as to what cases have been brought and what were the holdings of the cases.

Now we don't concede that these adjudications with respect to those facts are material here except to explain the rulings. But we say that we brought independent proof in here to show what happened out here with Progressive.

Mr. Combs: Of course, Your Honor, I am reading
3179 this because I think it is applicable to the facts that they have brought in here. Talking about the litigation, and I want to clear our position on that.

I might also point out that counsel has brought in findings of fact in some cases here for proof of what his contentions are there. I think this is the same procedure here. I think that the Court acted upon the very questions that we are talking about here. I think they were specifically making that, and I have some authority to cite to Your Honor and the Court and to bring out by this witness.

Now there is one more item in connection with this case that I would like to call attention to. Now this opinion that I have been reading from was the opinion of the Court that was entered as the judgment of the Court, but the Court in its opinion asked the parties to submit to a decree to enforce its opinion.

Now the Court has — both parties have appeared with

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reference to the decree to be issued, and the Court has issued its decree. Now this decree and order is dated April the 5th, 1951.

Now this is the decree of the Court based upon the opinion that I have been reading of the Seventh Circuit. I call attention to page 14a of the slip opinion having to do with the decree, paragraph two. First paragraph a, little a.

"Ordered, Adjudged and Decreed by the United States Court of Appeals for the Seventh Circuit that the Petitioner, Peabody Coal Company, its officers, agents, successors and assigns shall:

"a. Cease and desist from"

"(2) Recognizing United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the O'Fallon and Millstadt mines for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment; unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board conducted election among the Company's employees; said election to be conducted as early as possible under applicable rules, regulations and practices; it being understood that Peabody need not bargain with any union claiming to represent the employees at the O'Fallon and Millstadt mines until the Board has certified the results of the election so held."

3181

CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Hopkins, I believe you stated on direct examination that the negotiations for the 1950 contract were carried on under the scrutiny of the District Court of the District of Columbia.

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By that statement, you didn't intend to say that the negotiations for the 1950 contract were carried on in the District Court and under the supervision of the District Judge of the District of Columbia, did you? A. Mr. Robertson, I intended to say, if I did not say it directly, that those negotiations were carried out in accordance with orders of the Court, under the Court's scrutiny.

As a matter of fact, on one occasion, if you ask me about it, the Court had some of the parties doing the negotiations before him in chambers to talk to them about certain phases of the negotiations.

So it was under the scrutiny of the Court and of the Attorney General and of the Labor Board and in compliance with the orders of the Court.

3182 Q. But the temporary — A. In the city of Washington.

Q. But the temporary restraining order was issued just like any other temporary restraining order, was it not, served on the parties by the marshal or some appropriate persons, copies left with them? A. The temporary restraining order of the National Emergency was issued ex parte about eight o'clock at night on Saturday evening, and we were served, I think, about twelve o'clock that night with a copy.

Q. And in the order of dismissal of this temporary restraining order, there is nothing contained in this order adjudicating the legality or the illegality of any provisions of the 1950 contract. That is correct, is it not? A. When you speak of the order dismissing the Penello injunction, or the National Emergency injunction?

Q. Yes, the Penello injunction. A. I do not have it in front of me, but it speaks for itself.

Q. (Hands document to the witness.) A. Merely recites, as I believe I read it into the record to the ladies and gentlemen of the jury, that at the present recitation that the temporary injunction is vacated, after recitation of the

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fact that the defendant, International Union and
 3183 Lewis, and I quote: "are in compliance with the
 recommended order."

That is the Board order, and further; that the Board,
 quote: "has closed its proceedings," end quote.

Q. And so, Mr. Hopkins, after the parties reached agree-
 ment, then the temporary restraining order became a moot
 question, and there was nothing left to be done but for it
 to be dismissed, just as any other injunction case? A. It
 didn't become a moot question at all, Mr. Robertson, until
 the completion of the Labor Board proceedings of which
 the Court took note after compliance. It was in full force
 and effect from the time of issuance on February 11, 1950,
 until it was dismissed on October 10, 1951, about eighteen
 months later.

Q. The adjudication of the legality or illegality of the
 provisions of the contract, they didn't take each provision
 of the contract and either construe or adjudicate the legal-
 ity of those provisions under any of these orders here? A.
 Why the precise question involved in the hearings that were
 held pursuant to the Penello charges was held by
 3184 the examiner and finally through the Circuit Court
 of Appeals, was whether or not we were guilty of an
 unfair labor practice charge based upon the wording of the
 old contract, to wit, the 1948 agreement which contained
 the same wording in it as the 1947 agreement, and was not
 the wording that is presently in the 1950 agreement.

It being arrived at under the orders of the Court, as I
 have outlined, and that wording has received the impri-
 matur and approval as to legality in several courts as I
 have related, including Circuit Courts.

Q. Yes, but I am talking about at the time of the 1950
 agreement, execution of the 1950 agreement, you are not
 saying that this was — the legality of this contract was
 construed? A. No, sir.

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Q. At that time. A. It was a result of bargaining under the compulsion and under the order and in accordance with the mandate of the Court in the injunction proceedings.

Q. Mr. Hopkins, I would like to read a statement from the 1952 convention minutes of the United Mine Workers of America which appears as a portion of an address by you at that convention.

That is page 524, the top of page 525.

And I will ask you if you did make this statement:

3185 "And it also comes to my mind that this new contract that is going to be presented to you and discussed perhaps by the report of your Scale Committee in just a few minutes, represents just one facet of the many things that your International officers have done in all the turmoil and travail of litigation.

"They have brought forth a contract, not on account of, not because of, but in spite of the Taft-Hartley Act, that one of these days is going to be repealed."

I'll ask you if you recall making that statement. A. I am quite sure you read accurately from the minutes that you have in front of you. I don't have them in front of me, but I recall the occasion, Mr. Robertson, and I might say to you that as I recall those remarks, certainly my intent in making them was in trying to say to that convention, which was the first one held after all the difficulty and the litigation of 1949 and 1950, that we had achieved, even in the face of the opposition that the operators so strenuously raised with us by virtue of their invoking the Taft-Hartley Law, so as to get the first Penello injunction and invoking, causing the government to invoke the second injunction by the Taft-Hartley.

3186 So assuredly the contract was achieved by the Taft-Hartley Law, because nothing in the law as applied in those proceedings gave us any comfort. It put restrictions on us, and we were able to negotiate it within the boundaries, within the four corners of the statute, but cer-

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tainly the restrictions against us were harsh and rigid, and I think that is what I meant.

Q. And you mean you were able to negotiate out with these various operators this contract? A. Yes, sir, there is nothing in there that inferred or intended to say that the 1950 contract was in violation of the Taft-Hartley Act or that was illegal.

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REDIRECT EXAMINATION

By Mr. Combs:

Q. Mr. Hopkins, you spoke of the parties being before the Court during the period of the negotiations of this contract in 1950 as a result of that restraining order. Would you tell us what you meant by that? A. The parties before the Court? Q. Yes, if they went back to the Court for advice on the restraining order. A. As I recall, it 3187 was once during the negotiating sessions — I can't recall which one — but a legal spokesman, Mr. John Gall, for one of the coal associations, Southern Coal Producers Association, was taking the position that his association did not have to participate in an overall conference representing other segments of the industry.

The union took the position that he was mandated or required under the injunction to do it. He demurred.

We went down to the Court for instructions. He saw us in chambers, and he told us in polite language that he thought the conference should be participated in by everyone, and he went back to the conference and participated as the representative for the Southern Coal Operators Association.

Q. I believe he also told anybody at that time that any one who left that conference left it at their own peril? A. He certainly did, sir.

Q. Now, in connection with the question that counsel asked you as to whether or not the 1950 contract was adjudicated by any of this litigation, you have testified of

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course that the charges brought by the operators before the Board resulted in the restraining order, and its dismissal occurred thereafter.

Now, I ask you whether or not you know whether
3188 the counsel, the general counsel for the Labor Board,
at that time who I believe was Mr. Denham — A.
Yes.

Q. And whether or not he knew about that contract and in effect approved the contract as being in conformance with the Labor Board charges and in compliance with the Labor Board order? A. Mr. Combs, I know of my
3189 own personal knowledge that he was aware of it, not only by word of mouth from me but by a written communication from others representing the operators themselves that the contract had been achieved, that the union shop clause had been settled "with the use of the words to the extent and manner permitted by law", and that was known to the general counsel. And further than that, when the hearing opened before the trial examiner, we made the fact known to the trial examiner and it was in part of the official records of that hearing.

Q. And this temporary restraining order, under the law that was asked by the National Labor Relations Board was dismissed because under the law the Labor Board had finally adjudicated the items that were raised that resulted in the temporary restraining order? A. That is right, sir, and the adjudication, I might say, by the board of the issue upon which compliance was had, did not undertake to challenge in anywise as being illegal or violative of the statute the words that were put in there to the extent and manner permitted by law although the words were well known to the Labor Board and the general counsel.

Q. Mr. Hopkins, just one question for clarification, I read from a decree of the Court in the 7th Circuit in the Perry Coal Company case — I read from a decree
3190 dated April 5, 1961 and a certain paragraph there. I ask you was that decree issued as a result of the

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Court's opinion in that case? A. Yes, sir, it was, in the same case and issued on April 15, 1961 as the decree by the Judges Duffy, Schnackenberg and Mercer, and they were the same judges who wrote the opinion in the same case as published on December 2, 1960.

Q. I believe you followed me as I read from that decree and it was from that decree that we are speaking of now? A. Sir?

Q. I believe you followed me when I was reading that excerpt from the decree, and that is the decree? A. I did, sir.

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RECROSS EXAMINATION

By Mr. Robertson:

Q. It is in this record, Mr. Hopkins, and I will ask you if you recall that the Penello restraining order was dismissed at the instance of both the union and the operators signatory to the contract? A. It wasn't dismissed at the instance of either one of us. It bears the wording, and read from 3191 it, "we consent to the entry of the foregoing order:" signed Dominick L. Manoli, Attorney for the National Labor Relations Board, and signed by me as attorney for the respondents. But it was prepared, I might say to you, sir, by the Labor Board, presented by the Labor Board, and I merely approved it as to form and was present when it was entered.

Q. You said that the Labor Board, back in 1950, was satisfied as to the legality of the union security clause. I wonder if you can explain to me why in 1960, in the Perry Coal Company case, the Labor Board took the position that this clause was in violation of the law? A. I said to you, Mr. Robertson, that the wording used in the 1950 agreement in the security — union security clause, were well known not only to the general counsel of the Board but all of its representatives and the members of the board for the reasons I have stated.

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Now they undertook to accept charges and issue a complaint in 1958 — I believe it was in the Perry Coal Company case, alleging the union to be in violation of the unfair labor practice section of the law, and as one facet of it they averred that the union's demand for the contract to contain that clause was an unfair labor practice. But the Court of the 7th Circuit did not agree with that, and they specifically said that that language was legal and was not violative of the statute.

Q. But the Labor Board did, before that Court —
A. They said that wording constituted an unfair labor practice, but the Court did not agree with them.

(Witness excused.)

By Mr. Rayson: Your Honor, we desire to read into evidence certain portions of the Annual Report of the Tennessee Valley Authority, 1957 and 1958.

The Court: Yes, sir.

Mr. Rayson: We have shown these reports to opposing counsel, and as I understand it there is no question but what these are the reports we are now reading.

Reading from the Annual Report of the Tennessee Valley Authority for the fiscal year ended June 30, 1957,
3193 at page 32, under the general title "Steam-Electric Generation."

"Steam-electric generating facilities continued to operate at high efficiency. For the second year in succession the average annual heat rate was well below 10,000 BTU per net kilowatt-hour generated. In the fiscal year 1957 the average rate was 9,705 BTU per net kilowatt-hour, compared with 9,780 BTU the year before. The national average in the calendar year 1956 was 11,400 BTU per kilowatt-hour.

"Because of the favorable hydro conditions it was unnecessary to operate the older and less efficient steam plants. Even Watts Bar Steam Plant, built by TVA dur-

ing World War II, remained idle. Memphis Steam Plant was used for minimum generation for load regulation.

"The steam plants burned 18.2 million tons of coal during the year at an average cost of 19.35 cents per million BTU. This was an increase of 3.6 per cent over the cost of coal in the previous year."

There follows a statistics table which I shall omit. And then from the same report, at page 33, under the heading "Coal Supply":

"The steam plants received 20.4 million tons of coal, as compared with the 18.2 million tons burned, and the 3194 stockpile was increased by 2.2 million tons. At the end of the year, TVA had a 100-day supply of coal on hand, as compared with a 60-day supply at the beginning. A total of 5.3 million tons was in storage.

"The total delivered cost for coal was \$91.8 million. The average cost per ton was \$4.51, as compared with \$4.36 the year before. The cost per million BTU, delivered was 19.36 cents, a 3.5 per cent increase over the fiscal year 1956.

"Increased coal costs reflected several factors. Miners' wages increased during the year, with some significant fringe benefits added. Several rail freight rates increased. Considerable heavy buying in the early part of the year to achieve prompt buildup of stockpiles was done in the face of unusually high prices in some supply areas. Prices in the TVA area were influenced by the national picture in which the demand for coal began a rise in the latter half of 1954 that continued through 1955 and most of 1956. It began leveling off late in 1956 and early in 1957.

"In the last half of the fiscal year 1957, after 12 consecutive 6-month periods in which demands increased, there was a decrease of nearly 8 per cent in TVA's coal 3195 purchases. This resulted from the completion of the stockpile buildup plus the favorable hydroelectric supply situation.

"At the same time, prices of coal in some areas began to decline somewhat. It appeared that the rise in fuel costs,

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which had increased from 18.11 cents to 19.36 cents per million BTU over the past 2 years, would be interrupted, at least, in fiscal year 1958. Spot coal prices declined about 30 cents a ton at Kingston and John Sevier steam plants and about 20 cents at Widows Creek during the year. Prices in the west Kentucky and southern Illinois fields were trending downward at the end of the year.

"Long-term coal contracts made in previous years have had a moderating effect on average fuel costs, both in the period of rising prices and in the recent period in which prices showed signs of declining."

And from the TVA 1958 Annual Report, under the section entitled "Power Generation", which section begins at page 52, I will read from that section beginning at the top of page 53. This involves the fiscal year ending in June, 1958.

"Rainfall and runoff were above normal for most of the year, with the result that the hydro system was heavily loaded most of the time. In fact, during certain periods—January, February, late March and early April—the hydro system was used for base load operation, thus reversing the normal roles of hydro and steam power on the system."

"The reservoirs were 76 per cent full as the fiscal year began, a high level for that period, while ground water levels were also high. These factors, plus adequate steam capacity, made it possible to maintain a satisfactory level of hydro production during two low-rainfall months—July and August. September rains totaled 7.7 inches in the watershed above Chattanooga, where most of the storage reservoirs are located, and water supply was ample from then to the end of the year. In fact, although the hydro system generated more than 2.2 billion kilowatt-hours in December, a record for any single month, it was necessary to spill water at some of the tributary dams instead of running it through the turbines in order to bring the reservoirs down to flood control levels. Although January,

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February, and March rainfall was below normal, runoff remained high and heavier than normal rainfall in the last 3 months of the fiscal year, permitting heavy loading of the hydro system. Hydro generation in May was 3197 second only to December as the highest month of record.

"As a result of good hydro conditions, it was possible to meet system loads at times with several of the large new steam-electric units shut down. Only limited use was made of the four Widows Creek units without a reheat cycle, and use of units at Colbert and John Sevier plants was limited at times. It was also possible to keep units out of service for longer periods of regular maintenance, thus reducing overtime labor costs.

"With reduced steam-electric generation, the system heat rate rose slightly, but it remained well below the 10,000 BTU level. Average BTU required per net Kilo-watt-hour generated was 9,760, compared with 9,705 the year before."

I will omit again the table that is shown at this point in the annual report. And then under the section "Coal Use and Purchases"—this is at page 53.

"The steam plants consumed 17 million tons of coal during the year, a reduction of nearly 7 per cent from the 18.2 million tons used the year before. Purchases of coal during the year amounted to 18.6 million tons, or 1.8 million tons less than the year before.

3198 "Purchases exceeded use by 1.6 million tons, and the stockpiles at the plants totaled 7 million tons at the end of the year. More than half the stockpile gain occurred in the last 3 months of the year when, because of favorable hydro supply and some decline in loads, daily average coal use declined to 41,884 tons compared with a 48,200-ton average in the preceding 9 months.

"The cost of both coal received and coal burned went down slightly compared with the previous year. The lower costs were largely the result of the business recession,

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several freight rate reductions, reduced purchases and increased mechanization of mines.

3199 "Total cost of coal purchased during the year was \$81.3 million. The cost averaged \$4.49 per ton, or 18.94 cents per million BTU, about 2 per cent less than in the previous year. The cost of coal burned, including that purchased last year at higher prices, amounted to \$4.54 a ton or 19.13 cents per million BTU."

There again appears a table subsequent to which was introduced in evidence through the TVA witness Hill, and then this paragraph:

"In the interest of assuring an adequate, low-cost fuel supply, TVA continued to encourage greater mechanization in mines and improvements of mining methods. A contract was awarded to a company in Tennessee for coal to be produced from experimental operation of an underground auger. This will be the first use of this equipment in the area supplying TVA, and, if successful, could lead to economical mining of some Tennessee coals where underground mining has virtually ceased because of poor roof conditions. Another long-term contract called for submission of a plan by the contractor for improving efficiency of his mines by mechanization. By the end of 1958, despite some delays, an experimental mine had produced sufficiently good results to prompt the contractor

3200 to extend mechanization to his other mines. At present, coal is loaded by hand and hauled to the surface by mules.

"During the year work was begun in cooperation with the Kentucky Geological Survey on an investigation of coal reserves in western Kentucky. Coal reserve studies for northern Tennessee were continued."

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Mr. Kramer: May it please the Court, the original plaintiff and cross-defendant rest.

The Court: Anything further for the original defendants and cross-plaintiffs?

Rebuttal Evidence

Mr. Rowntree: We have four short items, your Honor, odds and ends.

The Court: All right.

Mr. Rowntree: First, we would like to add the unemployment index on two important counties. Anderson

County, and reading from Exhibit 122: Anderson 3201 County average monthly covered employment and annual payrolls in the coal industry in Tennessee counties, 1950 through 1956—in Anderson County, 1950 average monthly employment, 1,032. Dropping to 1956, average monthly employment, 467.

This is in the coal industry.

The employment index in Anderson County dropping from 100 per cent in 1950 to 45.2 in 1956.

Morgan County, in Morgan County in 1950 average monthly employment in the coal industry, 254. Dropping to 1956, to 95.

The employment index in Morgan County dropping from 100 per cent in 1950 to 37.4 in 1956.

The next item, reading from Exhibit 114, steam electric plant capacity, Table No. 1 in that exhibit, pages 13 and 14, there is a column showing the design of each plant with respect to fuel for consumption and this column gives under some plants coal, gas and oil; with respect to others, coal and oil. With respect to the TVA plants, including the plants Widows Creek, Colbert, Shawnee, Johnsonville, Kingston, John Sevier and Gallatin, in each instance the fuel designated is coal and coal only.

We have as a third item, the BTU on the Phillips coal, and we wonder if counsel will stipulate on the average BTU.

Mr. Kramer: Yes. What does this purport to 3202 show, Mr. Rowntree?

Mr. Rowntree: That purports to show the BTU contained in the bids of Phillips Brothers Coal Company,

Rebuttal Evidence

the guaranteed minimum BTU, both on a dry basis and an as delivered basis.

Now I believe that we have had both kinds of figures inserted in the record. For instance, Mr. P. B. C. Smith was on the stand yesterday testifying as to the average BTU used in steam electric generation in Illinois and Indiana, and I think it will be agreed that that would be on an as delivered basis.

Mr. Kramer: Are these figures that you are now wanting to show or wanting to introduce—and I understand this is a tabulation taken from your bid sheets?

Mr. Rowntree: That is correct.

Mr. Kramer: And that this tabulation taken from their bid sheets, your Honor, is a tabulation of the specification as made by Phillips Brothers when they submitted their bids.

Mr. Rowntree: That is right.

Mr. Kramer: It is not—in other words, as I understand this, there is submitted with each bid that goes to 3203 TVA—it is really hardly an estimate—but it is the amount of BTU that the bidder thinks is in his coal from tests he has made; then the payment is made on the test of the delivered product, and these are shown by their bids the figures that they gave for BTU when they submitted bids, is that right?

Mr. Rowntree: That is right. It is the guaranteed minimum BTU.

Mr. Kramer: In other words, there will be an adjustment made in price, if they don't meet it?

Mr. Rowntree: That is right.

Mr. Kramer: We will stipulate that this is a tabulation taken from their bids on that basis.

Mr. Rowntree: I might say Mr. Scollon, the witness from the Department of Interior, talked about average BTU's and I think that he was talking about a dry basis. Would you agree to that?

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Mr. Combs: I don't think we can, your Honor, because this is just a little bit too complicated. We would refer to the record on his testimony. That is a little too complicated.

Mr. Rowntree: All right.

Phillips Brothers Coal Company's average BTU computed as stated as delivered, 12,383. BTU of Phillips Brothers on a dry basis, 13,215.

3204 We have one further item, your Honor.

Mr. Kramer: I take it what you are saying is that the average of the various bids?

Mr. Rowntree: That is right.

Mr. Kramer: In other words, what he has, your Honor, is an item by item of bids, and now he has the average of all their bids submitted, the BTU.

Mr. Rowntree: This next item pertains to the files introduced by Miss Roche with respect to beneficiaries of the welfare. I don't think it will take very long.

Mr. Robertson: Miss Roche introduced by her testimony six files, being Exhibits 138, 139, 140, 141, 142, and 143. We have gone through these files and of those six files, three of those, Exhibits 141, 142 and 143, were files in which the applicants filed their applications after the answer in this lawsuit was filed and, therefore, the trustees knew that this would be at issue in this court, and were completely processed after the filing of our answer, and, therefore, we take the position that these three exhibits have no probative value in this case at all.

As to the other three files, Exhibits 138, 139 and 140, I would like to point out certain matters contained in those files.

3205 First of all, I might state in all three of these files, these men had left the industry as of the time that he applied for his pension. On the first of these, Mr. Clem Terreo, Form 13E, which he is required to submit

Rebuttal Evidence

shows that he was a union member up until the time that he left the industry.

3206 It might be well to point out also that this applicant wrote a letter to the Bureau of Information, Washington, D. C., on January 6, 1955, asking for copies of eligibility requirements. On January 18, 1955, Miss Josephine Roche replied to him that, "No copies of fund regulations were available for public distribution," and did not send him any application forms.

On January 27, 1955, by letter, Mr. Terreo inquired as to whether or not they would send him some application forms. By letter of February 4, 1955, Miss Roche answered and sent the forms, which forms asked about his union affiliation.

He submitted these forms properly filled out, and on March 16, 1955, he wrote to Miss Roche asking for them to acknowledge receipt of this application together with the supporting documents, and he apparently received no answer.

He was compelled to hire an attorney—

Mr. Kramer: Now, just a moment, Your Honor. We object to the conclusion of counsel.

The Court: I sustain that.

Mr. Kramer: He was compelled to hire an attorney.

The Court: I sustain that.

Mr. Robertson: A letter from an attorney dated 3207 April 23, 1955, addressed to Miss Roche, states as follows:

"We have been requested by Clem Terreo, 322 Burgess Street of this city, to write to you concerning his application benefits from the Welfare and Retirement Fund. He states that he forwarded his application on February 10, 1955, and on March 16, 1955, he wrote again requesting your acknowledgment of the receipt of the application and thus far, he has heard nothing with regard to the matter.

"Please advise the status of this application, and the

approximate time Mr. Terreo can expect to hear from you regarding this matter.

Mr. Kramer: I would like to point out, Your Honor, in order to be consecutive in this file, that in this file between the dates of those communications, there is a letter written to ascertain—March 2nd—ascertaining whether or not the job he says he was working in last is within the eligible jobs for which—because it says if you are not in classified employment, you cannot receive benefits whether you are union or non-union—and a letter was written on March 2nd inquiring whether or not the job he was holding which was armature winder was within the classification or without the classification before benefits could 3208 be awarded.

Mr. Robertson: I will point out that that letter is March 2nd, prior to the time that Mr. Terreo wrote to Miss Roche on March 16th.

Mr. Kramer: Yes, but it is the earlier letter when you say the time elapsed.

Mr. Robertson: The first letter inquiring about it was on March 16th, after March 2nd when she wrote inquiring about that, and then the attorney wrote again on April the 20th.

Mr. Kramer: Yes, that's correct.

Mr. Robertson: A letter to this attorney from Mr. Val J. Mitch, counsel for the Trustees, in which he states that he "shall go into this matter very carefully, and you should hear from me within a reasonable period of time."

May 3rd, 1955, an inter-office correspondence sheet from Mr. Val J. Mitch to Miss Roche stating that in his opinion Mr. Terreo meets the requirements of eligibility for pension, and a letter of June 7, 1955, in which Mr. Mitch informs the attorney that the pension has been granted.

The second file we believe is pertinent is that of Steve John Molner, which is Exhibit 139, and this—his pre-

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liminary application is sworn to on the 4th day of 3209 June, 1957, shows that he was a member of the United Mine Workers of America as of the time he applied for the pension.

I refer to the blanks there: "Is miner a member of the United Mine Workers of America?" and the answer is "Yes." "If yes, list—"; and the local union number if 472, and his district number is Number Two.

Mr. Kramer: And this same application says, Your Honor, "Is the miner presently employed?" "Yes." "By what company?" "Maryland Casualty Company." "Job classification?" "Gardner." "Place of last employment in the coal industry?" "Johnstown Coal and Coke Company," Date of last employment in the industry was in August, 1949, and that the recent employment since then was for the Maryland Casualty Company for whom he began his employment in July, 1952, and that this application is dated on the 4th day of June, 1957.

So the last employment in the industry, Your Honor, was in 1949.

Mr. Robertson: Of course, I stated in the beginning that all three of these men had left the industry as the Fund requires them to prior to application.

3210 Mr. Kramer: Oh, no, wait a minute. That is not accurate. That is not the testimony, Your Honor. I ask Your Honor to instruct the jury to disregard that statement.

The Court: Oh, yes, disregard that. Statements by counsel are not evidence, remember that, members of the jury.

Mr. Robertson: I point out that I am in error as to the requirements of leaving the industry, but that sole requirement so far as being in the industry is that unless he was regularly employed in the coal industry immediately prior to May 28, 1946, twenty years required service within the thirty years immediately preceding the filing of the application must all have been worked after May 28, 1946.

Mr. Kramer: That is correct, but that is certainly vastly different from what counsel stated, Your Honor.

Mr. Robertson: This man had left the industry but was nevertheless still a member of the union.

The third file, being Exhibit 140, on John Shenkarik.

3211 Mr. Robertson: In Mr. Mitch's testimony here as to the application forms that are sent to those who apply directly to the Fund, that the union district and local union certification portions are torn off.

On that particular contention, this—the application blank is shown in this particular file, showing the place for the certificate of the local union and the certificate of the district, to certify that the applicant is a member in good standing of the United Mine Workers of America.

Mr. Kramer: And that is true, Your Honor, but those certificates are not filled out. By accident they got the wrong form and sent it out, but when this came back and the pension was later granted, those were blank.

Mr. Robertson: I refer to a note, a scratch pad sheet in the file which says:

"Not a member, continue processing if meets requirement of eligibility. Refer to RTB," And the initials "JR".

Mr. Kramer: "Not a member, continue processing if meets the requirements."

Mr. Robertson: Now I point out a letter from Mr. Donald L. McFarland, Supervisor, Review Unit, 3212 Pension Benefits, to Mr. Samuel Caddy, Jr., Secretary-Treasurer, District 30, United Mine Workers of America:

"Dear Mr. Caddy:

"We are enclosing the yellow, white, blue and pink copies of Mr. Shenkarik's application for pension in order that Items 16 and 17 might be completed.

"When this has been done, would you please send the yellow copy to this office at your earliest convenience."

Rebuttal Evidence

Items sixteen and seventeen are the certificate of local union and district membership.

Mr. Kramer: Now there is a response to that in there.

Mr. Robertson: "When this has been done, would you please send the yellow copy to this office at your earliest convenience.

"Your assistance in this matter is appreciated."

That letter, incidentally was dated May 2nd, 1956, the same month that the pension was authorized.

Sorry, Your Honor, they tell me there is a response to that.

Mr. Kramer: It is my recollection that there is a response to a similar letter in one of these files. Maybe I am wrong. What is the date of that letter?

3213 Mr. Robertson: May 2nd, 1956.

I might point out that that letter was sent to the district the same month that the pension was authorized, if I am not mistaken, bearing on Mr. Lewis' testimony that that was done in order to get information from the District on the pensioner, and I find no such correspondence in this file.

I further point out that none of these files relate to the medical and hospitalization benefits, and I would like to read from the Standard Authorization for Pensions, Form 1-P, Revised 6-15-54, and these authorizations for pensions contain these provisions:

3214 "This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefore."

And then the provision that the pension payments will be made the first day of each month—strike that.

Mr. Kramer: That paper was read by us, or by op-

posing counsel—I am not sure which—when these files were introduced. And it is already in there because, of course, as conditions develop the amount of the pension has to be reduced—and pensions have been reduced, and that is in the record—a pensioner is granted a hundred dollars a month and because of the financial condition of the Fund it is necessary to reduce it to \$75.00 a month, that is the record and that was proven—that was the purpose of including things of that sort.

Mr. Robertson: Of course, it is our contention that such things as this, and the fact that the districts and local unions are notified of these pension applications, that this is a cooperation on the part of the Trustees for 3215 the union to impose the constitutional—the inactive dues upon these pensioners as required by the United Mine Workers constitution would also enable the unions to hold these pensions over these mens heads in order to use them for union activities as we have shown in the record.

Mr. Kramer: Now, of course, that simply is a matter of argument. We have introduced six of those applications of different dates. They speak for themselves in everything that is in here. There is some more correspondence in this Shenarik file, and I haven't happened—it is a very voluminous one, and I would like just a minute to get something more. I didn't know that this particular thing was coming up.

I do find one letter that is in this file I want to read, Your Honor.

Juror Wilson: May I ask the file number?

The Court: Yes. The file number?

Mr. Kramer: You mean the exhibit number?

Juror Wilson: Yes.

Mr. Kramer: The exhibit number is 140—S-h-e-n-k-a-r-i-k. There are others in the file.

Rebuttal Evidence

The Court: All right.

3216 Mr. Kramer: This letter is dated February 15, 1956, after Mr. Shenkarik made his application. It says:

"Your correspondence of January 13, 1956, concerning pension benefits, has been referred to this office for reply.

"According to the rules and regulations of the Welfare and Retirement Fund, as set up by the Trustees"—

This is a letter written on the letterhead of United Mine Workers of America, District No. 30, by Sam Caddy, Jr., Secretary-Treasurer.

Mr. John Shenkarik, Box 301, Olive View, California, dear sir:

"Your correspondence of January 13, 1956, concerning pension benefits, has been referred to this office for reply.

"According to the rules and regulations of the Welfare and Retirement Fund, as set up by the Trustees of the Fund, the eligibility requirements for Pension Benefits are as follows:

"1. Applicant must be 60 years of age or over when he applies.

2. Applicant must have retired from or ceased work in the Bituminous Coal industry after May 29, 1946, following regular employment in a classified job for an operator signatory to the National Bituminous Coal Wage Agreement.

3. Applicant must have been regularly employed in a classified job in the coal industry immediately prior to May 29, 1946.

4. Applicant must have completed twenty years of classified service in the coal industry within the thirty years immediately preceding the date of his application for pension.

"Your application for Pension Benefits should be made

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direct to the Welfare and Retirement Fund. Their address is as follows:

"UMWA Welfare and Retirement Fund
907 Fifteenth Street NW
Washington 5, D. C."

That was the information that was given to this applicant.

You will note there is no requirement for union membership there.

There is in this file, your Honor, the correspondence between this man and others writing for him, stating his employment, including one from the Consolidated Coal Company which states when he was employed by them, one from the United States Steel Corporation, which states the years he was employed as a captive miner, and another one from the United States Steel Corporation, giving dates—all of this correspondence, your Honor, in 3219 this file, and showing that he had not been for a considerable period of time a member nor employed in the coal industry. He had at one time been a member, this record shows.

Mr. Rowntree: The defendants and cross-plaintiffs rest.

Mr. Kramer: The original plaintiffs and cross-defendant United Mine Workers of America rest, your Honor.

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Kramer: We want to present to your Honor two motions, and Mr. Rayson will make one and Mr. Combs the other. We will argue, if you care to hear argument.

The Court: I don't care to hear additional argument, gentlemen.

3220 Mr. Rayson: The Trustees, John L. Lewis, Josephine Roche, and Henry G. Schmidt of the United Mine Workers of America Welfare and Retirement Fund

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renew their motion for a directed verdict in the manner, form, and language made on behalf of the Trustees at the conclusion of the Cross Plaintiffs' proof, which is to say, without reference to that detailed language we used at that time, that the Trustees move for a directed verdict on the grounds that there is no evidence on which the action against the Trustees may be sustained.

The Court: All right, Mr. Combs.

Mr. Kramer: Mr. Combs suggested that I make it, and I do so.

Now at the conclusion of all the evidence, comes
3221 the Defendant the United Mine Workers of America, and renews its motion on the entire records as made up to this time for a directed verdict—for the Court to direct the jury to return a verdict in its favor—and for the same reasons, based upon the same grounds that we stated in our motions at the close of the plaintiffs'—yes, the Cross Plaintiffs' evidence it would be.

The Court: During and at the conclusion of the arguments of counsel, in support of motions, and the arguments of counsel resisting the motions, the Court indicated its views about the case.

The Court overruled those motions at that time, but indicated to counsel for the defendant, cross-complainant, that he was much concerned about the status of the Trustees in this lawsuit. The Court further indicated that it did not feel that the question was nearly as close with respect to the United Mine Workers under the proof that is in this record.

Now insofar as the Court can determine at this time, there have been no developments in the proof of the original plaintiffs and cross-defendants that would cause the Court to change his mind with respect to the motion, except this last proof of Mr. Hopkins, in which he
3222 filed Court records of one of the District Courts in the District of Columbia, and the record pertaining

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to certain directives or orders of the Labor Board.

It seems to this Court that those records put a grave burden upon the Phillips Brothers Coal Company to convince the tryers of fact that the 1950 Collective Bargaining Agreement was not reached after long and patient deliberations and possibly in response to the prodding of the District Court in Washington.

3223 In the opinion of this Court, those records, Mr. Rowntree, greatly weaken, if not destroy, the position that the UMW and one or more of these so-called large operators agreed to stabilize the coal industry in 1950 and that in furtherance of that conspiracy, which Phillips Brothers Coal Company says was an illegal one, raised the wages of coal employees to the point that the small coal operators could not pay, which the union and the coal operators knew they could not pay, and raised the royalties on the coal so high that again the small operators could not pay them, which the UMW and the so-called large coal operators knew they could not pay.

Phillips Brothers Coal Company says this basic agreement, evidenced by the writing of 1950, was signed by the union through its officers and the coal operators, of which Phillips Brothers Coal Company was one, for the specific purpose of stabilizing the coal industry, and in order to reach that end it was necessary to put the little operators out of business which Phillips Brothers says the union and large operators agreed to do.

If that was the agreement, of course such an agreement was illegal under our anti-trust laws. But the difficulty with that contention, Mr. Rowntree, stems from
3224 these recent court records introduced by Mr. Hopkins. Those court records indicate to this Court that those coal operators and the union were contesting many of the points involved in this agreement.

I believe that the witness stated that the coal operators—Southern Coal Operators and the union representatives met up there in Bluefield for periods of about 40 days,

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and that they met at White Sulphur Springs, West Virginia on about 30 days.

Mr. Rowntree, how do you get around those court records?

3225 Mr. Rowntree: You are talking about these court records, the Verifax copies?

The Court: Yes, these last records.

Mr. Rowntree: If your Honor please, those records were in our direct proof. They are in the minutes of the convention. We read most of them into evidence. We used them to show that this was not any ordinary labor-management bargaining business. This was a collision between two great forces in a basic industry in this country. It was not just a matter of a 70 cent increase in wages. That is obvious.

The President of the United States had to intervene in this matter twice in these negotiations and appoint fact finding boards. He had to pursue the injunctive remedy through the Department of Justice. This was a basic struggle in the industry and these court records prove that.

The Court: Do they prove that there was concert of action and unity of design on the part of these coal operators and the union?

Mr. Rowntree: Yes, sir, because of the record which immediately preceded this. The record is clear that there was a crisis in the coal industry. The record is clear that the union was seeking to represent all members before this time, and this is an issue upon which Mr.

3226 Lewis has split his testimony. In the deposition he answered the questions with respect to this matter of spreading the work in the industry. He answered the questions with respect to his statement back in 1948, that there would have to be a stabilizing plan in the bituminous industry, just like there was in the anthracite industry. He stated in 1948 that in the anthracite industry "we have spread the work with the cooperation of the State of Pennsylvania. We have a stabilizing plan. We

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have work for everybody. It is a production control plan."

And he said in 1948 that when the time came in the bituminous industry "we will spread the work in that industry. We will have a three-day work week, if it becomes necessary."

Now in these negotiations, in the period of 1949, he imposed the three-day work week, and he testified in his deposition that three-day work week was for one purpose and one purpose only, to spread the work, just like in the anthracite industry.

This great struggle which the President of the United States had to settle was not just about 70 cents in wages. The fact finding board said that. It was not just a matter of these little trivialities in a contract. It was a struggle between big industry on one hand and big labor 3227 on the other as to how this control and this stabilization of a basic industry will be carried out and the industry was contending that these large mines will have to cut down on their working time and carry this heavy load factor of cost, incurred by tremendous investments; they would have to cut down and increase their costs and, as Mr. Lewis said, the operator said, "No, that hurts us on our left hip pocket. It hurts us in our purse."

That is what the struggle was about.

The Court: Now, Mr. Rowntree, I recognize that you refer to these court records in your proof in chief, but I did not get the force of them at that time as I did from the orders which were read here today.

Now what is a conspiracy? In the law, conspiracy is an agreement by two or more persons to do an unlawful act or an agreement by two or more persons to do a lawful act in an unlawful manner.

I am not a trier of fact. If there is any dispute about these facts, I am required to submit them to the jury. There is no rule better established than that. But these court records indicate to me that these parties were acting through regular channels. They were bargaining with

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each other. They weren't acting in concert, as I
 3228 get the purport of these orders. They were acting
 in part, if I interpret these orders correctly, because
 they were made to act.

Well now, if they were made to act under the law and
 if they were made to bargain under the law, and one side
 gives up some points and the other side gives up some
 points and they finally reach an agreement, now can it
 be said when they are acting under valid law and finally
 reach an agreement, that agreement is proscribed by an-
 other federal law, namely one or both of Sections 1 and
 2 of the Sherman Act?

3229 Now that is just what is running through my mind.

As I understand conspiracy, either civil or criminal
 conspiracy, the parties to it must act wrongfully. Now
 if these parties have negotiated, if they were doing what
 they were required to do under the law, then how can it
 be said that they violated another Federal Act?

Mr. Rowntree: By entering into a lawful agreement on
 its face with the understanding, the conspiratorial under-
 standing, may it please the Court, as to how that contract
 would be later used, and we think that the evidence is
 clear on how it was later used.

The Court: You think that as a part—you think this
 proof shows that as a part of all of those negotiations,
 that there was an agreement made—

Mr. Rowntree: Conspiratorial agreement.

The Court: Sir?

Mr. Rowntree: Yes, sir, conspiratorial agreement.

The Court: To drive these little operators out of busi-
 ness.

Mr. Rowntree: Resolving this dispute as to how stabili-
 zation would be attained, and we think the record is clear
 that they did attain, that the record with the course
 3230 of these big mines up to 1950, and then the re-
 versal, and immediately subsequent conduct of the

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parties. They walk out of the settlement, they say, "Well, the big mines, the operators now have control of their working time; the union has given up on that; we are turning that welfare fund over to the union."

The Court: Now if they reached those agreements by conspiring in this collective bargaining agreement, and I would have to say as a matter of law that they did on the record, then could there be violation of the anti-trust laws?

Mr. Rowntree: They could easily enter into a contract that would satisfy the authorities, and at the same time have an understanding with respect to how that contract would be used in the future. And I think that it is clear what a tremendous advantage is given to form a conspiracy by having the weapon of labor—big labor force—against the small companies, and the weapon of great economic force in the competitive economic field, one seeking to push out of the market, reduce the market of the small companies, the other seeking to increase its costs, and the facility that was given to a conspiratorial plan by the national contract—and we are not saying that it was illegal to have a national contract—but the 3231 facility of that instrument, we say, was obvious to those people at that time.

The Court: You are saying that this contract was used to put the little ones out of business?

Mr. Rowntree: Subsequently, yes, sir.

The Court: Well, are you saying that there was an understanding to that effect, oral understanding to that effect?

Mr. Rowntree: We are saying there was an oral conversation, one, two, or three conversations, probably discussions over a period of time. Because the issue was obviously of tremendous importance in this industry in that period of time.

The Court: Well, now, how can the Trustees, specially Miss Roche, the deceased Trustee—

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Mr. Rowntree: Mr. Owen.

The Court: —Mr. Owen, and this Trustee, had so much trouble making up his mind whether to resign or not to resign?

Mr. Rowntree: Senator Bridges?

Mr. Combs: Van Horne.

The Court: Van Horne. When Judge—what's his name?

Mr. Kramer: Dawson.

The Court: When Judge Dawson went to Washington to be a trustee, he wasn't recognized.

Now which of those trustees do you say, if any of them, participated in this alleged conspiracy?

Mr. Rowntree: We say those named in the 1950 contract who were Lewis, Mr. Owen, and Miss Roche.

3233 Mr. Owens and Miss Roche, we believe, were the parties nominated by Mr. Lewis in accordance with the testimony in the record that Mr. Lewis was trying to nominate two stooges, according to one representative of the operators. And one representative of the operators said that he was trying to name the full board of trustees, and we think the testimony of Judge Dawson shows clearly that somebody with the operators had nominated him.

We think that the testimony is clear that he was duly appointed but he was not the man Mr. Lewis wanted on the board so he did not get on it. The contract named Mr. Owens.

We think that Miss Roche is subject to criticism, that she was pretty much tied to the union before she got on as a so-called neutral trustee, and that it has been easy for this fund to be manipulated in such a way that the benefits of the fund are paid only to union members; that the participants in the pensions may be controlled by the union, and their cooperation in organizing deals has been used in subsequent campaigns to drive out small mines

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or bring them under the contract or to force them to sell to the big coal companies, and whatnot.

3234 We think that their participation has been largely one of omission. For instance, the record is clear that old men were used on picket lines for as long as two years in hot weather, cold weather, rain and snow.

We don't think that that is the kind of things that ought to go on under the pension there, and I don't think the trustees would have permitted it if they were representing their offices as they should.

The requirements of the union with respect to process applications, the retention of membership on the part of pensioners—all those things could not have been carried through if this fund was operated in accordance with the Taft-Tartley Act and in accordance with the contract that it be operated by a party representing the union and a party representing the employer and a neutral party, and the Supreme Court has said that Congress was concerned about union officials obtaining tremendous control and power by reason of developing control of the gigantic welfare funds.

Mr. Combs: May it please the Court, may I make just one observation. The Court has indicated that it does not want any argument on our side, but I would like to make one observation.

3235 In connection with the statement of counsel, of course there comes a time when it is the evidence in the record that we have to look to and it is not the statement of counsel.

Now in connection with the Court's observation concerning these judicial actions in Washington, I think that that case applied, your Honor, with full force in this lawsuit. And I just want to quote one line from the case—it is the case of Great Northern Railway Company v. Delmar Corporation, 283 U. S. 686, 691, and this case teaches this:

“Where two constructions of a written contract are

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possible, preference is given to that one which does not result in violation of law."

The Court: I expect to charge the jury that; yes.

3236 Mr. Combs: I think that goes to the question of whether or not there is any evidence here that would give possible chance to construction—

The Court: Gentlemen, I overrule the motions.

How much time do you want to argue?

Mr. Kramer: Your Honor, I want to renew another motion, that a mistrial be entered because of the introduction of certain testimony over the objection with reference to the alleged conspiracy and the introduction which includes, of course, the evidence with reference to acts of violence, it being introduced, your Honor, upon the premise that it would later be connected up with some act that would amount to a conspiracy. But there has been no proof in this record connecting it up so as to make it competent evidence, and that, not being connected up, could not be cured even by striking, and it is prejudicial, and, therefore, we would be entitled to a mistrial.

The Court: I overrule that motion.

Mr. Kramer: Then, your Honor, I make another motion. I submit that there is no evidence at all, your Honor, so far as the Island Creek Coal Company is concerned, so far as the Pittston Company is concerned, so far as the

Consolidated Coal Company is concerned, so far as
3237 Peabody Coal Company is concerned, so far as
Pittsburgh Midway is concerned, under which a verdict could be sustained as to them as being conspirators and at least to that extent we should have a directed verdict.

The Court: That motion is overruled. They are not sued, gentlemen.

The Court:

3238 This is not an easy case. This is a very complex case.

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The court realizes the force of these motions, that is the first two. Now these that Mr. Kramer made, they were sort of decorative motions, these last ones about partial and summary judgement and things like that, but that motion for the trustees for a directed verdict is a serious motion and the Court recognizes it is a serious motion and it is a highly debatable motion. The Court also recognizes that this motion for a directed verdict for the UMW is a serious motion and is a debatable motion, certainly.

Now you have entered records here involving the 3239 facts, and this jury is entitled to know this in detail from each individual, from each side, what they are to decide and why they are to decide it, and it is going to take, in my opinion, meticulous arguments on both sides for this jury to understand this case.

3241 The Court: Now what do you gentlemen think about those verdict forms?

Mr. Rowntree: The forms are agreeable with us, Your Honor.

Mr. Kramer: Your Honor, I am not certain whether — we thought of course in our request that if they found there was a conspiracy, if the jury found there was a conspiracy —

The Court: A conspiracy?

Mr. Kramer: Yes, sir.

The Court: Mr. Kramer, I did that to show the answers, Why? Because certain companies were named and in order to hold those companies they had to be named by the jury.

3242 This is not this case, these companies are not before this Court, and why should this Court, in the absence of their representatives, in the absence of their counsel, require this jury to put their names down in their verdict? I just don't see the necessity of it. I don't see

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that it will add anything to the case one way or the other, and I don't believe it is proper under the record.

Mr. Kramer: Well, I just would like to say this, Your Honor, we would like — Your Honor may be correct. I am not saying Your Honor isn't correct.

3243 Mr. Kramer: But, Your Honor, will you give us an opportunity to look at these and check the authorities. Your Honor may be right.

I had the impression we were entitled to a charge — I do not have a case — before I agree to these charges, would you give us an opportunity?

The Court: Yes. I told counsel in chambers that we would put this in here and the Court reserves the right to formulate these issues the way it thinks proper.

Mr. Kramer: And before the argument Tuesday, we will be willing to tell Your Honor whether it is acceptable and if we resist it formally we will try to have some authorities, rather than make a spot judgment on it.

3244 (At 9:00 a.m., counsel for the respective parties appeared in chambers before the Court and the following proceedings were had in the absence of the jury.)

The Court: All right, Mr. Kramer.

Mr. Kramer: Your Honor, we want to request on the record that in the Verdict Form No. 2, which is the form that is applicable to the cross-action against the United Mine Workers of America, that Questions 2 and 3 be made Questions 3 and 4, and that Question 2 in the suggested form which your Honor has showed us ask the jury, if they find a conspiracy, that they name the parties to the conspiracy.

The Court: Now the Court deferentially overrules that request.

Mr. Kramer: Now aside from that, and this may be off the record —

(A discussion was had off the record.)

*Trustees' Renewal Motion for Directed Verdict;
Closing Arguments*

Mr. Rayson: May it please the Court, we would like to restate the motion made after the close of evidence Friday afternoon, the motion for directed verdict on behalf of the Trustees, so that it will clearly and properly appear 3245 in the record in this fashion.

John L. Lewis, Josephine Roche, Henry G. Schmidt, Trustees, United Mine Workers of America Welfare and Retirement Fund, now at the conclusion of all the evidence renew the motion for a directed verdict in their favor as heretofore made at the conclusion of the defendants' proof, on the grounds and for the reasons there stated now based on the entire evidence, it being understood that was the motion we made.

The Court: Yes, sir. Same ruling.

(At 9:20 a.m., Court convened in open court and the following proceedings were had in the presence of the jury.)

3306 Mr. Templeton: May it please Your Honor, ladies and gentlemen of the jury, it would be my purpose in the next fifteen minutes or less to state to you in a general way our position in this lawsuit, we being the defendants and cross complainants.

Conspiracy is our sword of defense and of offense. It is the only question that you have to decide, whether or not one existed, whether or not it affected us.

3307 Each of these things that have been done by these conspirators, taken alone, is not subject to criticism of any kind. It is perfectly legal for them to do it. The thing that makes it illegal is that it is a part of a diabolical scheme or plan to take over a large part of the coal markets of this country, including principally the granddaddy of them all, the TVA, which incidentally, ladies and gentlemen, is the only haven of refuge left for Buster Phillips and Jim

Closing Arguments

Pennington and little operators like them, and that is where they have gone.

Now when did this conspiracy start? We don't say it started on a certain date in 1950 or even in 1950. We don't know exactly when it started. We just know that it is there,

Mr. Rowntree:

3331 We say this conspiracy started in 1950. The negotiations over the 1950 contract were long and bitter. The country as a whole suffered. The record shows that governors of three states tried to intervene. Finally the President of the United States directed his Attorney General to intervene with injunction suits. The operators brought a raft of cases before the National Labor Relations Board complaining about terminology in the contract.

The fact finding board appointed by the President found that behind the maneuvering over these contract terms, there were certain basic economic questions, matters of dollars and cents. This was a real national crises involving a basic industry of the country. The country labored, and what came out of it was a mouse, or so it looked on its face, a contract hardly distinguishable from the contract of 1948. It had certain added terms and provisions here and there, and in two or three clauses of the contract.

Now was that what all the fussing and the fuming
3332 was about in that year 1950? Why, of course not.

We say this contract of 1955, was innocuous and innocent enough on its face to satisfy everybody, but we say that there was a final decision, a final reaching of a basic understanding at that time between these two powerful contending forces with respect to the future of the coal industry.

3333 With respect to how this innocent looking contract would be used to attain the purposes agreed on, basically our contention is this:

That certain forces, powerful forces, were wilfully and conspiratorially set in motion in 1950 to attain this purpose

Court's Charge to the Jury

that certain large coal combines would take over the business of producing the coal of the country and barring from that portion all other companies and their employees, and that this coal wage agreement of 1950 was to be used to attain that purpose.

We say that the strings of this conspiracy have been drawn tighter and tighter in these intervening years and that in recent time the danger has picked up, and that the climax is near at hand.

We believe the record shows clearly that there was a crisis in the coal industry in the period of 1948 and 1949; that a decision was made, that the pattern was successfully set for the coming years.

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3432 (Thereupon, Court and counsel returned to the open courtroom where the following proceedings were had in the presence of the jury.)

The Court: Members of the jury: This suit was instituted by John L. Lewis, Henry G. Schmidt, and Miss Josephine Roche, as trustees of the United Mine Workers of America Welfare and Retirement Fund, hereafter referred to as "Trustees", and James M. Pennington, Ralph E. Phillips and Burse Phillips, individually and trading as Phillips Brothers Coal Company, hereinafter referred to as "Phillips Brothers", for \$55,982.62 alleged to be due pursuant to the terms of a trust provision contained in a collective bargaining agreement which existed between United Mine Workers of America, hereafter called "UMW" and the defendants, Phillips Brothers, and being alleged royalty payments due said defendants on coal mined under said agreement.

3433 The only defense raised by Phillips Brothers to the claim of the Trustees is that the collective bargaining agreement, which provided for the royalty payments, was an instrument used in a conspiracy to violate

Court's Charge to the Jury

Sections 1 and 2 of the Sherman Anti-trust Laws, and that the Trustees participated in the conspiracy.

The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers.

Phillips Brothers, by cross-claim, charge that UMW conspired with various coal companies, particularly Consolidation Coal Company, Peabody Coal Company, West Kentucky Coal Company, Nashville Coal Company, Island Creek Coal Company, the Pittston Company and Pittsburgh-Midway Coal Company, and others, to restrain interstate trade or commerce among the several states in the bituminous coal industry in violation of Section 1 of the Sherman Act and that they monopolized or attempted to monopolize trade or commerce among the several states in the bituminous coal industry in violation of Section 2 of the Sherman Act.

It is the contention of Phillips Brothers that after World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was
 3434 more coal being produced than the market required; that before 1950 the major coal producers and the Union agreed that the major problem of the industry was over-production and that the growth of small, independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on the solution of the problem immediately following World War

II.

3435 That the Union contended that the working time of the employees should be cut and urged a three-day week. That the major coal companies were opposed to the Union's dictating the working time of the men in the industry.

That a marked change occurred in the relations between the Union and the major coal companies in 1950; that the

Court's Charge to the Jury

express understanding at the time of the signing of the 1950 Bituminous Coal Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economics of the industry was to be taken care of by eliminating the smaller and weaker companies in great numbers.

That the conspiracy involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; that the accomplishment of the purposes of the conspiracy was furthered by the domination of the Union over the men in the industry and that in 1950 the Welfare Fund was turned over the Union's control, and that rather than oppose the Union's efforts to evade the Taft-Hartley Act as they had before, the major companies fostered the Union's domination of the men of the industry so

that the terms of the National Bituminous Coal
3436 Wage Agreement could be imposed upon the small mines; that by successive amendments to the Uni-

form National Bituminous Coal Wage Agreement's terms and wage scale, the Welfare Fund payments per ton were raised to exceedingly high levels; that the mechanization program of the major coal companies was to go ahead rapidly and that the successive increases in wage scale and Welfare Fund Payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; that the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits; that the Union had no concern as to whether the weaker companies could pay; that the Union displayed its knowledge that the weaker companies could not pay and that they

Court's Charge to the Jury

would fall by the wayside by reason of the increased terms; that the Union favored the taking over of the industry by the large combines of coal producers and that the Union worked toward this end; that the campaign to impose the wage contracts upon the smaller companies was intense after 1950; that in the areas of strong resistance mobs and terrorism were used; that the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were organized into bands which had as their purpose the
3437 imposition of the uniform contract upon the smaller and non-union companies; that the paying of the Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the Union, certified to by local, district and international Union officials; that the enticement of benefits under this Fund was held out to the men in the industry as being under Union control; that the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the contract; that one or more major coal companies has assisted in crushing the opposition of the principal Union competitor of the UMW in the bituminous coal labor fields; that the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of employment; that to accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; that companies which could not afford to pay the wage scale were barred from operating on the lands of signatories to the contract; that the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large market under large contracts.

That in 1955, the conspirators manifested their
3438 intent to take over the TVA market by working with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the

Walsh-Healey Act; that the purpose was to drive out of the Government market, particularly the TVA market, the small coal producers; that this determination imposed a wage rate upon a producer of coal supplying coal to a Government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; that this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; that because contracts for less than \$10,000.00 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; that the conspirators set about to eliminate or drastically reduce the spot market of TVA; that when this effort failed to bring results, the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; that in this phase of the campaign, the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; that the Union had over \$25,000,000.00 of capital invested in these companies; that large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced prices; that the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

That the small companies who survived the onslaughts of the conspiracy have been killed off by such lawsuits as this brought by the Trustees of the Welfare Fund; that prior to 1958 some three or four cases were brought by the Trustees against some of the larger producers in the area; that cases against the smaller producers were commenced in 1958 and that some forty-one of these cases have been brought and are presently pending against the small com-

Court's Charge to the Jury

panies of the area in the State of Tennessee since January 1, 1958.

That the UMW, in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests, as an organization of wage earners, but was aiding, abetting and cooperating with businessmen in an effort to restrain trade of small companies and to monopolize the industry for the major coal companies; that the conspiracy involved boycotts and the purpose to stabilize the prices of coal in the industry; that the practices used pursuant to the conspiracy, particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies such as Phillips Brothers and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable.

That a central part of the agreement among the alleged conspirators was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and intent that these companies in large numbers would go out of business because they could not pay the increasingly higher prices and welfare royalties which were designed to meet the abilities of the large combines to pay as the mechanization programs of the large companies progressed; that the purposes of the conspiracy were effectuated by the major coal companies' permitting the Union to assume a dominating role over the labor force in the coal fields by evasion of the labor statutes which protected the rights of the employees of small companies to join or not to join a union and to select their own bargaining representatives; that thereby, the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and as to whether their bargaining agreement with their employers will be on such a basis that their employers can stay in

Court's Charge to the Jury

business and their jobs can be preserved; that in this
3441 case, the Union completely ignored the employees of

Phillips Brothers, and, having no authority from those employees and without having them as members and without their knowledge, the Union extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers; that several months thereafter, and before the employees knew of or had ratified the contract, and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union shop clause of the contract was enforced by the Union and the employees were required to join the Union in order to go back to work; that they were not given cards under the Welfare Fund until they did join the Union; that it was only under these circumstances that the Union received any authority or right to act as bargaining representative of the employees of Phillips Brothers Coal Company.

That the conspiracy involved open defiance of, and a scheme to evade, the labor statutes of the United States.

Now in response to those contentions of the original
3442 defendant and cross-plaintiff, Phillips Brothers Coal Company, the United Mine Workers of America denies that it entered into any contract or joined in any combination or conspiracy in restraint of trade or commerce in violation of the Sherman Act; it denies that it has monopolized or attempted to monopolize or that is combined or conspired with any other person or persons or group of persons to monopolize any part of the trade or commerce among the several states.

It says that by virtue of Section 6 of the Clayton Act, which is Title 15 and Section 17 of the United States Code and which is the provision that exempts labor unions from the anti-trust laws while engaged in activities that further the legitimate objects of labor unions, and that by virtue of the provisions of the Norris-LaGuardia Act, 29 United

Court's Charge to the Jury

States Code, Section 10, et seq., the negotiations and the execution by the Union of the National Bituminous Coal Wage Agreement of 1950, and that agreement as amended, and its acts and conduct in connection the enforcement thereof, do not constitute a violation of the Sherman Act.

That U.M.W. is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for and execution of the collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1950, and the amendments thereto.

U.M.W. denies that there was upon its part any conspiratorial conduct or any wrongful conduct, or that it committed any wrongful, conspiratorial, illegal or monopolistic acts violative of the Sherman Act and that in the period of time involved herein of the acts done by U.M.W. and involved in this action were motivated by legitimate labor goals and for the purpose of securing union standards of wage and better conditions of employment for its members.

U.M.W. denies that it participated in, or that it authorized or ratified any acts of violence complained of by Phillips Brothers. It denies that in any of the activities complained of in this case it conspired or joined with coal operators or any other non-labor groups for any purpose in any manner. It contends that the mechanization of mines and the changes of mining methods which have occurred in and since 1950 are not the result of any conspiracy or any effort to restrain trade or any effort to create a monopoly, nor have such occurred by reason of wrongful conduct on its part, but that such changes have occurred as an outgrowth, result and development of American economy in the industry over the years.

It denies that there was upon its part any conspiratorial conduct or any wrongful conduct or that it committed any wrongful, illegal, conspiratorial or monopolistic acts in connection with the actions which

Court's Charge to the Jury

were had under the Walsh-Healey Act for the establishment of wages by those employed in the mining industry.

It denies that Phillips Brothers have any right to rely upon any proceedings with respect to the Walsh-Healey minimum wage determination either as a basis of liability under the Sherman Act or as a part of an alleged conspiracy under said Act.

U.M.W. contends that with respect to each act Phillips Brothers Coal Company complains of, that it acted in its capacity as a labor organization and that its objectives were always labor goals for the betterment of its members and itself.

It contends that there was no conspiracy on its part with any group and it is not liable to Phillips Brothers in any amount.

Now for response to the contentions of Phillips Brothers Coal Company, the Trustees of this trust fund rely upon all of the matters raised as defenses by the U.M.W. insofar as they are applicable to the Trustees' phase of the case.

The Trustees deny that in the administration and enforcement of the trust fund they have surrendered their duties and obligations to the U.M.W.

3445 The Trustees say that their conduct or actions in instituting this particular suit, or any other suit or suits which they have instituted for the collection of welfare funds, was not in furtherance of any conspiracy or any monopolistic intent, but assert that their conduct and actions in this respect were in furtherance of their duties and obligations under the trust.

The Trustees deny that they have any control of or right to exert control over the actions of the beneficiaries of the fund.

The Trustees deny that the right to receive or retain benefits of the fund is dependent upon membership in the U.M.W. of America.

Court's Charge to the Jury

Both U.M.W. and the Trustees say that if there was any interference with the production of coal by Phillips Brothers, the amount of interference in the reduction of the production is not sufficient to bring any claim or to sustain any claim for violation of any of the provisions of the Sherman Act.

Both the U.M.W. and the Trustees deny that Phillips Brothers suffered any damages as a result of any alleged illegal or wrongful action or conduct on the part of either of them.

The issues for you, the jury, to determine in this case insofar as the cross-claim of Phillips Brothers against the U.M.W. are as follows:

3446 (1) Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or to monopolize or to attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers?

If you answer Question 1 "No",—that is the question I have just stated—the remaining questions need not be answered.

(2) If the answer to Question 1 is "Yes", was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?

(3) If the answer to Question 2 is "Yes",—and that is the one I have just read—the jury will fix the amount of the damages.

The sole issue to be decided by you, the jury, on the claim of the Trustees against Phillips Brothers is whether or not the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states as alleged by Phillips Brothers.

The question as to whether the Trustees are or are not

Court's Charge to the Jury

entitled to recover the unpaid royalties from Phillips
3447 Brothers is one of law for the determination of the

Court after receipt of the verdict of the jury on the question of whether or not the Trustees did or did not participate in the alleged conspiracy.

Now members of the jury, we come to discussion of the applicable provisions of the Sherman Act, and also some of the rules of law that govern this case.

The pertinent part of Section 1 of the Sherman Act is as follows—and the Court is now quoting from Section 1 of the Sherman Act:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

The pertinent part of Section 2 of the Sherman Anti-trust Act is as follows:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations,” shall be deemed guilty of a violation of law.

“Commerce”, as defined in Section 12 of the Clayton Anti-trust Act, means—and the Clayton Act is a part of the anti-trust laws, keep that in mind—means “trade or commerce among the several states and with foreign

3448 nations, or between the District of Columbia or any State, territory or foreign nation, or between any insular possession or other places under the jurisdiction of the United States.”

The term “conspiracy to monopolize” as used in Section 2 of the Sherman Act, means to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they may be able, as a group, to exclude actual or potential competition from the field and provided

Court's Charge to the Jury

that they have the intent and purpose to exercise that power.

Section 15 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States . . . and shall recover three-fold the damages by him sustained."

3449 Section 15(b) of the Clayton Act provides that "any action to enforce any cause of action under" the anti-trust laws "shall be forever barred unless commenced within four years after the cause of action accrued."

The pertinent part of Section 6 of the Clayton Act provides that labor is not a commodity or article of commerce, and nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; "nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

This provision exempts labor unions from the application of the anti-trust laws while acting alone and carrying out the legitimate objects of labor unions. However, a labor union is not entitled to this exemption and it does come under the anti-trust laws when, in order to further its own interest, it aids, cooperates with, conspires or combines with business groups in order to accomplish purposes which the anti-trust laws prohibit.

Phillips Brothers Coal Company filed its cross-claim in this suit on February 14, 1958 and if entitled to re-
3450 cover at all would not be entitled to recover any damages sustained prior to February 14, 1954. The damage period, insofar as the cross-claim is concerned, is from February 14, 1954 to December 31, 1958, the latter date being the date that Phillips Brothers terminated its

Court's Charge to the Jury

business as a partnership. This means that Phillips Brothers Coal Company, if entitled to recover, cannot recover any damages allegedly sustained prior to February 14, 1954, or subsequent to December 31, 1958.

It is not every act in restraint of trade that is prohibited by the anti-trust law, but the question is generally one of reasonableness of the restraint. Section 1 of the Sherman Act prohibits those classes of contracts or acts which are deemed to be undue or unreasonable restraints of trade and those which new times and economic conditions would make unreasonable. Section 2 of the Sherman Act makes the prohibitions of the Act all the more complete by embracing all attempts to reach the end prohibited by Section 1, that is, restraints of trade, by any attempt to monopolize or monopolization thereof.

However, there are classes of restraints which from their nature or character are unduly restrictive and hence are forbidden without regard to the question of reasonableness. Group boycotts or concerted refusals by traders to deal with other traders, have long been held to be 3451 in this category. They have not been saved by allegations that they were reasonable in these specific circumstances. Even when they operated to lower prices or temporarily to stimulate competition they have been banned.

Any combination which tampers with price structures is an unlawful activity. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce, is illegal.

The jury must determine from all of the evidence in the case whether the Union, on the one hand, was acting alone to further the interest of its members in wages and working conditions. Or, on the other hand, was acting in combination with the large coal companies to restrain trade of small companies or to attempt to monopolize the industry for

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large companies. If the jury finds that the Union was thus acting in combination with the larger companies, then the jury must determine the reasonableness of the types of restraints employed, including a consideration of the character and extent of the restrictions and the reasons for the restrictions; but if the jury finds that the restrictions include the use of boycotts or price-fixing or price stabilization restrictions, these types of restrictions are illegal, regardless of the reasons for, or the character of, those 3452 restrictions.

With respect to the claim of Phillips Brothers that the alleged conspiracy involved a plan to evade the labor laws, the Court charges you that the defense of Phillips Brothers to the claim of the Trustees and the claims asserted in the cross-claim are not based upon the labor laws, but upon the anti-trust laws. Moreover, this Court has no jurisdiction in this suit to decide any question as to whether there have been or have not been unfair labor practices committed by anyone. Issues with respect to unfair labor practices under the labor laws are exclusively under the jurisdiction of the National Labor Relations Board.

As previously indicated, Phillips Brothers Coal Company charges that it was the purpose of the Union and the large coal companies in the 1950 National Bituminous Coal Wage Agreement, and the amendments thereto, to fix the wages and royalties so high in these agreements that the small companies could not pay them, and that the Union and the large companies knew that the small companies, including Phillips Brothers, could not pay them and that the small companies would be forced out of business, and that it was a part of the conspiracy to drive the small companies out of business.

It is for the jury to determine whether there was a purpose among the alleged conspirators to impose the national

Court's Charge to the Jury

contract upon small operators for the purpose of
3453 restraining trade, monopolizing and driving small
companies out of business; or, whether the purpose
was to improve working conditions, better pay, more wel-
fare benefits, and better job security. The labor law pro-
tects the rights of employees to join a union or refrain from
joining a union. It protects the rights of employees of a
particular employer to make their choice about joining a
union free from encouragement or discouragement on the
part of the employer and free from coercion on the part
of a labor organization. Under the labor law the normal
collective bargaining is carried on with the employer by a
representative, usually a labor union, designated or selected
by the majority of the employees of that employer unit,
which representative "shall be the exclusive representative
of all the employees in such unit for the purposes of collec-
tive bargaining."

In the normal process of collective bargaining where
simply labor or employer-employee relationship purposes
are involved, specific unfair labor practices which violate
these rules are in the exclusive jurisdiction of the National
Labor Relations Board, not in a District Court such as this
Court.

However, as stated, Phillips Brothers Coal Company does
not assert a defense or claim founded on these labor pro-
visions of the law, but asserts that there was a conspiracy
violating the anti-trust law which involved a plan to
3454 impose the National Bituminous Coal Wage Agree-
ment upon small companies such as itself—not for the
normal labor or employer-employee relationship purposes
—but with the purpose, knowledge and intent that the
national contract with its successive amendments would
finally force the company out of business.

If a labor organization, by force or violence or any other
means, gains the right to represent employees of an em-
ployer in the collective bargaining process, the means em-

Court's Charge to the Jury

employed to obtain this right of representation, even if of an unlawful nature, would simply be an unfair labor practice outside of the jurisdiction of this Court, if the purposes were solely to represent those employees and carry on collective bargaining with the employer on behalf of employees. But if there is a purpose on the part of the labor organization to impose a contract upon an employer, regardless of whether it had gained authority to represent the employees of that employer, for the purpose of driving the employer out of business and putting the employees out of the industry, so that the industry markets would be left to business groups with whom the labor organization conspired, then such activity comes under the anti-trust law and is prohibited.

3455 Finally, with respect to the labor law, that law permits the establishment of welfare funds in collective bargaining agreements but it provides that the benefits under the funds shall be paid to the employees of the employer or employers signing the agreement and this law does not say that the benefits may be paid exclusively to union members, and the law provides that the employees and employers shall be equally represented in the administration of the fund together with such neutral persons as the representatives of the employers and representatives of the employees may agree upon. Violations of this part of the labor law are subject to restraint by District Courts. Here, again, Phillips Brothers Coal Company asserts that part of the alleged conspiracy in restraint of trade and to monopolize, directed against small coal companies was the understanding, on the part of the alleged co-conspirators, that the United Mine Workers was to have control over the Welfare Fund. The company says this furthered the conspiracy in two respects: In the first place, it is contended that this assisted in the domination of employees as a means of bringing small companies under the national contract with a view to putting them out of business. The company asserts that the latter purpose was facilitated by holding

Court's Charge to the Jury

out benefits to small company employees as being under union control and dependent on union membership. In the second place, it is contended that domination of the fund by the Union gave the Union the opportunity to use beneficiaries of the fund to carry on picketing and other 3456 activities that helped bring small companies under the contract for the ultimate purpose of putting them out of business.

With regard to the welfare provision for the payment of 40 cents per ton royalty, the claim of the Trustees against Phillips Brothers Coal Company will be finally decided by the Court after the verdict of the jury. But the jury must decide the issue of whether the Trustees participated in the conspiracy alleged. Phillips Brothers Coal Company contends that participation in, and assent to, the alleged conspiratorial purposes on the part of the Trustees of the fund was a necessary and essential part of the conspiracy, without which the domination of employees of small companies and use of beneficiaries of the fund by the Union against small companies could not have been at- 3457 tained.

The Court instructs you that, under the law, Phillips Brothers Coal Company, as a signatory to the collective bargaining agreement, had an equal responsibility with the Union with respect to the Trust Fund and a part of Phillips Brothers Coal Company's responsibility to his employees was to inform them that they were entitled under the agreement to apply for benefits from the Fund. The Phillips Company knew that the employees were entitled to apply for benefits from the fund.

As previously indicated, Phillips Brothers Coal Company charges that there was a conspiracy to monopolize under Section 2 of the Sherman Act, in addition to the conspiracy to restrain trade under Section 1. Section 2 of the Act prohibits not only actual monopolies, but also prohibits attempts to monopolize and conspiracies to monopolize.

Court's Charge to the Jury

An actual monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices. However, where the charge is not that there was an actual monopoly, but a conspiracy to monopolize, the alleged conspirator may be held guilty of, or liable for, the conspiracy to monopolize without it being shown that he ever acquired the power to carry out the object of the conspiracy, 3458 that is, to exclude actual and potential competitors from the market.

It is not necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade results as the consequence of the alleged conspirators' conduct or business arrangements. You will note that the anti-trust law provides that not every act in restraint of trade is illegal but only when it is the result of a combination, contract or conspiracy. Those words, so far as this case is concerned, mean practically the same thing, and it is a necessary element in the cross-claim of Phillips Brothers Coal Company that you should find that there was a combination or a conspiracy to restrain trade or suppress competition or to monopolize and that the conspiracy was national in character but affected Phillips Brothers Coal Company in its operations in Campbell County, Tennessee.

Or Anderson County, if it operates in Anderson County, but instead of Campbell County, it could be said—the Court doesn't remember the proof, whether it operated in more counties than Campbell or not—but to be on the safe side, instead of Campbell County, whether the alleged national conspiracy affected Phillips Brothers, operations in Tennessee.

3459 A conspiracy may be defined as a combination of two or more persons or corporations or unions, who by concerted action seek to accomplish or succeed in ac-

Court's Charge to the Jury

completing an unlawful purpose or a lawful purpose by using unlawful means. Corporations only act through their officers, agents and employees, and if the officers, agents or employees are acting within the scope of their authority, the corporation for whom they act is bound by their acts.

Similarly, unions act through their officers, agents, employees and members and no union participating or interested in a labor dispute may be held responsible or liable in any court of the United States for the unlawful acts of individual officer, members or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or of ratification of such acts after actual knowledge thereof.

Before you can return a verdict that the Union attempted to monopolize the bituminous coal industry, specific intent to restrain trade or to build a monopoly is necessary in order to violate Sections 1 and 2 of the Sherman Act, where the acts committed by the party or parties charged fall short of the results prohibited by the Act. But, if restraint of trade or monopoly results as the consequence of the cross-defendants' conduct, or alleged conduct, or alleged business arrangement, specific intent to restrain or monopolize is not necessary in order to find that Sections 1 and 2 3460 of the Act have been violated.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. Laborers, however, have the right to strike and enter into agreements not to work, and unions have the right to induce laborers to enter into such agreements. Such agreements are not in themselves violations of the anti-trust laws.

The fact that a coal company which prior to the signing of the National Bituminous Coal Wage Agreement was able to produce and sell coal more cheaply than other companies

Court's Charge to the Jury

because the wages and benefits it paid to its employees were then less than those required by agreement, became unable to produce and sell coal on the same basis after they signed the Agreement, cannot be a ground for finding the Union liable under the Sherman Anti-trust Act.

Phillips Brothers Coal Company has charged that the wage provisions of the National Bituminous Coal Wage Agreement were set at high rates, and liberal welfare payments were provided for, and that small operators such as the cross-plaintiffs were driven out of the coal business. The Court charges you that if the wage and welfare payment provisions in these contracts were arrived at 3461 by the parties as a result of collective bargaining, the coal companies on their behalf and in their own self-interest, and the United Mine Workers on behalf of its members, and in their own self-interest, there is no violation of the Sherman Act in the establishment of the wage rates and welfare provisions through the contract, provided there was no agreement between the Union and coal operators to fix high wage rates and royalty payments in order to drive the small coal operators out of business.

Proof that the membership of the Union did not unanimously support the position taken by the Union and its leadership on collective bargaining questions in itself will not support a finding on your part that the Union violated the Sherman Act.

It is not a violation of the anti-trust laws for the Union to insist on the same wage and benefit provisions in all of its collective bargaining agreements with small, medium and large coal companies alike.

The fact that the Union was able to make investments of considerable size with its assets, does not constitute a violation of the anti-trust laws.

The activities of labor unions which are not violative of the Sherman Anti-trust Act do not become violations of

Court's Charge to the Jury

the Sherman Act even if such activities are carried out by violent means. Acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated.

3462 The Union during the entire period involved in this case had the right to make a substantial investment in a company engaged in the production of bituminous coal, and such investment, of itself, does not constitute a violation of the Sherman Act. Neither does it constitute a violation of the Sherman Act for the Union to make such investment for the purpose of having the company recognize and bargain with the Union and pay the Union scale of wages and fringe benefits, or for it to finance others in their acquisition of control in a company for the purpose of having that company recognize and bargain with the Union.

Evidence has been introduced in this case regarding the "union security clause," or the so-called "union security clause" in the National Bituminous Coal Wage Agreement, and the cross-plaintiffs have contended that this clause violated the Taft-Hartley law. You are instructed that the Taft-Hartley law is not one of the anti-trust laws and that you are not concerned in this proceeding with awarding damages for any violation of the Taft-Hartley law. You must in this proceeding consider simply whether there has been a violation of the anti-trust laws, not the Taft-Hartley Act, by the Union or the Trustees, causing damage to the cross-plaintiffs. You are further instructed that even 3463 if there were a violation of the Taft-Hartley Act regarding the Union security clause, there would not, on that account, be a violation of the anti-trust laws.

The proof introduced in this case discloses that in the National Bituminous Coal Wage Agreement of 1950, there is a provision to the effect that the operators signing the contract would not lease any of their respective coal lands as a subterfuge to avoid the provisions of the Agreement. In 1958 a provision (called the Protective Wage Clause) was added to the agreement providing in effect that com-

Court's Charge to the Jury

panies which sign the agreement would not buy coal from mine operators who were not paying the equivalent of the Union standards of employment. The Court charges you that in the period relevant here, you must consider that both of these contract provisions were lawful and that neither of them was in violation of the Sherman Act, provided these provisions were inserted in the Agreement at the instance of the Union in the desire upon its part to protect the Union scale of wages and other benefits and to prevent the operators who had signed agreements from evading their obligations under the contract, and provided that such provisions were not the result of an agreement with large coal operators to drive small operators out of business.

Phillips Brothers Coal Company has charged that it was a violation of the anti-trust laws for the United Mine 3464 Workers, together with certain coal operators, to approach the Secretary of Labor in order to obtain a minimum wage determination under the Walsh-Healey Act. The Court charges you that everyone has a right to approach officers of his Government to induce them to take lawful governmental action benefiting him. Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other governmental agencies, was not a violation of the anti-trust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor or any action taken by the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish in the coal industry so high as to drive the small operators out of business.

Without implying that the fact has been proved, the Court charges you that selling coal below the average prices at which coal is sold in the country does not of itself constitute a violation of the antitrust laws; nor does selling coal below cost of itself constitute a violation of these laws.

In order for these matters to be a basis for a finding of

Court's Charge to the Jury

liability in this case, you must find that pursuant to a conspiracy, the coal companies priced their coal to
3465 the TVA for the specific purpose of damaging the cross-plaintiffs, or damaging persons in similar situations to the cross-plaintiffs. Further, you must find that these bidding policies accordingly had the effect of damaging the cross-plaintiffs in their business.

3466 The Court instructs you that the right to compete in a free market presupposes a right to lower prices in good faith to meet the price of one's competitors on comparable quality of coal. It is not within the scope or purpose of the anti-trust laws to protect a business against loss in a competitive market; and a coal producer which reduces its prices in defense of its economic life may not be held guilty of eliminating competition or its competitors. The Court further instructs you that if price reductions made by a coal producer are made to increase the coal producer's volume and decrease its unit cost in order to retain its proportionate share of a diminishing market, such conduct is valid and may not be regarded as conduct violative of the anti-trust laws unless done with the specific intent to injure a competitor or unless done in combination with others to injure or drive a competitor out of business.

A conspiracy is a partnership in unlawful purposes. Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done.

A conspiracy may be proved by direct evidence or by facts showing there was a concert of action and a unity of purpose in effecting an unlawful object.

The conspiracy does not have to be in writing and there does not have to be formal agreement between the parties to establish such a combination, provided there is
3467 actually a combination of two or more persons, corporations or unions to do an unlawful act.

Conspiracies seldom would be proven by formal agreements, all of the facts and circumstances must be con-

Court's Charge to the Jury

sidered and the acts of the particular alleged conspirators must be looked at with reference to them. Conspiracy is seldom established by direct or positive testimony, but from its very nature is usually established by what is known to the law as circumstantial evidence. That is by proof of existence of such facts as authorize you to infer the existence of that which constituted a conspiracy, and showing unity of design and purpose to an agreement or compliance between the parties to do the things charged.

Before a fact sought to be established by Phillips Brothers Coal Company can be said to have been proved by circumstantial evidence alone, such as the alleged conspiracy, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inferences to the contrary can be drawn from the same circumstances.

If two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the facts sought to be proved, such as the alleged conspiracy, and the other inconsistent therewith, 3468 you should not infer the facts sought to be proved from such circumstances alone. In other words, if two inferences can be reasonably drawn from the same facts, one pointing to culpability and the other to innocent conduct, then it is your duty to infer that which indicates innocent conduct. This would mean that the inferences are in balance; that there is not that preponderance required for you to accept the inference in favor of the cross-plaintiff.

The existence of a conspiracy cannot be established against the Union or the Trustees by the acts or declarations of either of their alleged co-conspirators done or made in the absence of the Trustees or the Union. The existence of the conspiracy and each alleged co-conspirator's connection with it must be established by independent

Court's Charge to the Jury

proof based upon the reasonable inferences to be drawn from each such alleged co-conspirator's own acts, his own declarations or its own declarations through its officers or agents acting within the scope of their authority and his own conduct.

Before Phillips Brothers Coal Company can defend against, or defeat, the claim of the Trustees and before it can recover on its cross-claim, it is required to make out its case substantially as alleged in the cross-claim by a preponderance of the evidence. Preponderance means merely the greater weight of the evidence. A party who is required to make out his case substantially as 3469 alleged must meet its obligation with the greater weight of the evidence. The balance must be tipped in its favor. If the evidence swings the balance more heavily on the opposing party's side, Phillips Brothers Coal Company's case must fail. Also, if the evidence is in the state of even balance, Phillips Brothers Coal Company's case must fail, because in that event the parties are in the situation they had before the lawsuit was instituted.

In order to recover under its cross-claim based upon the conspiracy, Phillips Brothers Coal Company must show by a preponderance of the evidence that the conspiracy alleged in the cross-claim, substantially as alleged, existed during the period of this case, namely, from February 14, 1954 through December 31, 1958. Phillips Brothers Coal Company has the burden of proof upon this question. The burden of proof and the preponderance of the evidence ordinarily have reference to direct evidence and indirect or circumstantial evidence. Direct evidence is that contained in the testimony of a witness to a fact, the knowledge of which the witness acquired through one of his own senses. Indirect evidence is that knowledge which is inferred from known facts. It is not permissible to draw an inference from another inference. However,

Court's Charge to the Jury

it is permissible to draw reasonable inferences from proven facts.

Sometimes direct evidence falls short of proving the final and all important fact which a party seeks to 3470 prove. However, it is sometimes possible to prove facts of such significance or related character that the final or conclusive fact can readily be inferred from what has been proved. That is what is meant by proving a case by circumstantial evidence.

The major coal companies that Phillips Brothers Coal Company charges with being co-conspirators in the alleged conspiracy, of course, had the legal right to pursue activities which they considered to be in their own sound business judgment to the best interest of their respective companies, so long as they were not conspiring together and with the Union to restrain trade, or to monopolize or to attempt to monopolize. Likewise, the Union had the legal right to pursue activities which, in the judgment of the officers of the Union were to the best interests of the members of the Union in their wages and working conditions, so long as the Union was not conspiring with the other alleged co-conspirators for the purpose of restraining trade or bringing about a monopolization. If you find that the actions of the Union in this case were prompted solely by the motive to improve the working conditions and wages of its members, independent of the kind of conspiracy alleged by Phillips Brothers Coal Company, then you must answer that there was no conspiracy upon 3471 the conspiracy question. In making this determination, you must consider all of the evidence in the case.

There is nothing unlawful in trying to get possession of a market through skill, efficiency, superiority of produce or by entirely laudible steps. It is unlawful to combine with others to monopolize the market in a certain commodity in order to drive out or to stifle competition, or hamper competition.

Court's Charge to the Jury

If there was conspiratorial action by the Union, it would not be protected by the Norris-LaGuardia or Clayton Acts. On the other hand, if it is found that the Union was acting in its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups intent upon violating the anti-monopoly laws, the Union would not be liable.

It is the objective of any national labor organization to eliminate price competition based on differences in labor standards, but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

It is not a violation of the anti-trust laws for a labor organization to bargain collectively with a multi-employer group.

Hence, multi-employer bargaining in the coal industry is not a violation of the anti-trust laws.

3472 The Union's liability or non-liability ultimately depends upon the facts. The same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the Union acts alone or in combination with business groups.

The quotation "The same labor union activities may not be in violation of the Sherman Act, dependent upon whether the Union acts alone or in combination with business groups," is the language of the Supreme Court of the United States in the case of *Allen Bradley v. Local Union*, reported at 325 U. S. at page 810, et seq.

If you should determine that there was an agreement or conspiracy violative of the Sherman Act, recovery against the Union can be had only for conduct which "the conspiracy contemplated and embraced." A party to the agreement or conspiracy is chargeable with the acts of other parties thereto only if the acts are done in furtherance of the joint venture. An individual party cannot be held responsible for what others do beyond the reasonable intendment of the common understanding.

Court's Charge to the Jury

As the Court has mentioned before, you cannot return a verdict against the Union or the Trustees unless you find that they knew of the conspiracy and participated in it. A conspiracy cannot be inferred merely from the fact that several persons engage in similar business conduct with the same end in view, or, in this case, that the Union or the Trustees contracted with or dealt with coal companies.

Phillips Brothers Coal Company charges an unlawful conspiracy in restraint of trade which it says was participated in by the Union and the Trustees. Phillips Brothers Coal Company charges that there were various other participators in the conspiracy, specifically a number of coal companies. These coal companies are not defendants in this action so that if you find that there was a conspiracy in violation of the anti-trust laws but that only the coal companies participated in it, you must find in favor of the Trustees and the Union. However, to find against the Union it is essential that you find a violation of the anti-trust laws involving the coal companies, and participated in by the Union before you may find against the union.

3474 A combination of employees necessarily restrains competition among themselves in the sale of their services to an employer; yet such a combination, that is, a labor union, is not an illegal combination under the anti-trust laws. Accordingly, the fact that the Mine Workers Union obtained a large membership and bargained collectively on behalf of its members in itself is no ground for holding that union liable under the Sherman Act.

The Court charges you that restraints brought about by labor unions on the sale of employees' services to employers, however much such restraints curtail competition among employers are not in themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act.

Phillips Brothers Coal Company charges that the wage

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provisions of the National Bituminous Coal Wage Agreement were set at high rates, and liberal welfare payments were provided for, in order to drive small operators out of the coal business. The Court charges you that if the wage and welfare payment provisions in these contracts were arrived at by the parties as a result of good faith collective bargaining, and there was no agreement between the Union and operators to establish the wage rate and royalty payments so as to drive small operators out of business, the establishment of wage rate and welfare provisions through the contract would not be a violation of the Sherman Act.

3475 We come now to a discussion of the principles involving the alleged damages, members of the jury, insofar as such principles relate to Sections 1 and 2 of the Sherman Anti-Trust Law, and in that connection the Court charges you that under the anti-trust laws, every contract or combination in restraint of interstate commerce is declared illegal and every person who shall monopolize or attempt to monopolize or combine or conspire to monopolize any part of interstate commerce is guilty of an illegal act. The violation of these laws standing alone, does not, however, permit a recovery by any person or corporation or partnership unless he or it can establish that the business or property of that individual, partnership or corporation has been injured or damaged by reason thereof.

Phillips Brothers Coal Company, if injured by the Union's alleged violation of these laws, is entitled to recover only such damages as you may find to be the direct and proximate result of the wrongful acts on the part of the Union or such of them as you may find were committed by other co-conspirators pursuant to the alleged conspiracy with the Union. Phillips Brothers Coal Company is not entitled to recover any losses which may have been suffered as a result of a general economic condition, such as, for example, the decline in coal prices which did

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not proximately result, in whole or in part, from
3476 predatory pricing or price cutting by alleged co-
conspirators pursuant to the conspiracy. Phillips
Brothers Coal Company is entitled to recover only such
damages as you find have been established by a prepon-
derance of the evidence to have been suffered as a direct
and proximate result of the alleged conspiracy.

Phillips Brothers Coal Company's right to recover is
limited to actual damages, the amount of which must be
determined with reasonable certainty from the evidence.
It is not entitled to damages which are speculative, re-
mote or uncertain. The Phillips Brothers Coal Company
is not to be denied damages simply because its damages
may not be computed with exactness. Damages are re-
coverable if you are satisfied that they can be reasonably
approximated from the evidence in the case. The rule
which precludes the recovery of uncertain damages ap-
plies to such as are not the certain result of the wrong,
not to those damages which are definitely attributable to
the wrong and only uncertain in respect to their amount.
The question of the amount to which Phillips Brothers
Coal Company would be entitled, if you conclude that it
is entitled to recover, is entirely and solely your respon-
sibility, but the amount must be founded upon evidence
that furnishes some approximation of the damages that
the plaintiff has sustained.

Phillips Brothers was required to take all rea-
3477 sonable steps available to it to avoid loss of its
business and to remain in business. It is not entitled
to recover for any damages which could have been avoided
through the exercise of reasonable efforts on its part. It
is not entitled to increase its damages through inaction,
but must take all reasonable steps to mitigate its damage
and to avoid or reduce its loss.

Phillips Brothers Coal Company claims as an element
of damage that the alleged conspirators depressed the
price of coal on the TVA spot market by offering large

Court's Charge to the Jury

tonnages of coal on that market in 1956, 1957 and 1958 at low and dropping prices. In this connection, the Court charges you that cutting prices is not per se, that is in and of itself, unlawful under the anti-trust laws when done by a single seller, but must be accompanied by proof of intent to restrain trade or to monopolize, or constitute part of a conspiracy to restrain trade or monopolize. A conspiracy or combination for the purpose of depressing prices is illegal per se.

Phillips Brothers Coal Company contends that its principal market for steam coal in 1956, 1957 and 1958 was the TVA spot market and that it was a part of the conspiracy for the coal producers to offer large tonnage of coal on the TVA spot market at low and dropping prices in order to drive Phillips Brothers and other small 3478 producers from the industry and to monopolize the markets, particularly the large and growing TVA market, for the large coal companies.

It is contended that the Tennessee Valley steam coal market in the years 1950 through 1954 was relatively poor because the generation of electricity in the valley was accomplished by the large TVA hydroelectric system rather than by the use of coal. But with the development of the great TVA steam plant system, particularly in the years 1955, 1956 and 1957, this steam coal market in the valley tremendously increased, and that the market expanded by 450 per cent in a short period of time. It is contended that the market price partially responded to this tremendous increase in the market in 1956 but then dropped even below the price in the preceding period in 1957 and dropped still lower in 1958 because of the alleged price-cutting practices of the alleged co-conspirators.

It is claimed that the principal perpetrators of the price-cutting scheme were Pittsburgh-Midway Coal Company, Peabody Coal Company and West Kentucky Coal Company and its subsidiary, Nashville Coal Company, the latter two being the claimed principal violators. It is

Court's Charge to the Jury

further claimed that UMW gained control of West Kentucky Coal Company and Nashville Coal Company by outright purchases of capital stock and by loans to Cyrus Eaton and certain corporations affiliated with Mr. Eaton, and that these companies were operated at losses 3479 or without regard to profit during the period of the alleged practices. It is claimed that these companies were used to beat off the competition of local producers such as Phillips Brothers Coal Company by price-cutting practices.

It is insisted that the United Mine Workers and its alleged co-conspirators commenced an attack upon the small producers of coal selling to TVA by obtaining the determination of a minimum wage in the coal industry under the Walsh-Healey Act specifically for the purpose of eliminating the small coal producers from the TVA term market, thus squeezing them into the TVA spot coal market which was largely made up of sales of coal under the \$10,000 exemption afforded by the Walsh-Healey Act; that the UMW, through its president, commenced pressures upon the TVA to reduce the spot coal market and that the Union participated with large coal producers in conferences with TVA applying pressure to that authority to reduce the spot coal market; that while these pressures were being applied the alleged practice of price-cutting aforementioned was carried on by the co-conspirator coal producers to hasten the extinction of the local producers selling coal on the spot market.

It is insisted further that the alleged price-cutting practices of West Kentucky Coal Company and Nashville Coal Company were not only illegal per se, but were unreasonable in that the principal source of the coal 3480 alleged to have been put on the market in the price-cutting practice was coal from the Uniontown mine of Nashville Coal Company; that the coal from this mine was allocated to shipment to Tampa Electric Company under a long term contract; that this long term contract

Court's Charge to the Jury

was rejected by West Kentucky Coal Company and Nashville Coal Company under the alleged sham contention that it was in violation of the Sherman and Clayton Acts; that the coal was then diverted to the TVA market and offered in amounts of 60,000 tons upon the spot market of TVA at low and dropping prices in the period of 1957 and 1958.

It is claimed that the alleged price-cutting practices, particularly with respect to Uniontown mined coal from West Kentucky Coal Company and Nashville Coal Company, was a willful and intentional effort to divert coal to dump upon the TVA spot coal market for the purposes of damaging local producers and driving them out of that market. It is insisted that the elimination of local producers has been of great assistance to West Kentucky Coal Company, Nashville Coal Company and Peabody Coal Company in securing large contracts for many millions of tons in the period since the local producers were driven out and that the supplying of coal to TVA in the period of 1959 to 1961 has largely fallen into the hands of those three companies.

3481 Phillips Brothers contends that the alleged depression of the TVA market for coal by reason of the foregoing practices has damaged it in its business or property.

3482 Phillips Brothers has offered proof that its average price of steam coal in 1956 was \$3.92, and in 1957 it was \$3.20, and in 1958 it was \$3.13. It contends that these reductions in price in 1957 and 1958 were the result of the alleged price-cutting practices of the alleged co-conspirators, which Phillips Brothers contends were carried on throughout 1956, 1957, and 1958. It claims that the coal in the East Tennessee seams from which it mined its coal was of an extraordinary, high quality and should have commanded a better price than the average coal on the markets of the country. It contends that its prices for 1956, 1957, and 1958 for steam coal under all of these con-

Court's Charge to the Jury

ditions should have been at least the national average price. That it should be allowed to recover the difference in the price it would have received on a national average basis and the prices that it actually received in the years 1956, 1957, and 1958. That the difference in the prices it received for coal during these years and the national average price for bituminous coal for the same years amounted to around \$93,000.00.

The national average prices should not be considered as a basis for determining damages, unless the jury finds that the coal sold by Phillips Brothers, f.o.b. the mines, was at least equal in grade and quality and contained substantially the same BTU content as the coal considered in the average national sales price, f.o.b. mine; the cost of transporting the coal from Phillips Brothers coal mine to its available market was comparable to the transportation cost of coal included in the national market price; and, purchasers of coal in the utility market to which Phillips Brothers sold the coal required that coal purchased by them be of types and grades substantially equal to those required by coal purchasers in the average national market.

If the jury finds that there was the alleged price-cutting practices by the alleged co-conspirators pursuant to the alleged conspiracy, the question of the amount of damages suffered by Phillips Brothers Coal Company, if any, is solely for the jury to decide.

The jury may "consider as an element of damages the difference between the prices actually received and what would have been received" but for the alleged unlawful conspiracy.

Provided you find for Phillips Brothers on the question of conspiracy and find that Phillips Brothers was damaged by the conspiracy in its business or property, cross-plaintiff would be entitled to such compensation as would put it in as good position as it would have been in had the injury not occurred. In other words, it can only be

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3484 compensated for such injuries as it actually sustained in its coal mining business and in its property.

In assessing the amount of damages, you are not to take into consideration or be influenced in any way by the fact that such a verdict as you bring in for Phillips Brothers Coal Company will, under the anti-trust law, be trebled. You do not first find the amount of actual damage and then treble it and then report the treble amount as your verdict. Whatever you find, if any, will be the actual, or to use another word, the single damage. The actual damage is trebled by the Court as a matter of law. Nor will you allow interest or attorneys' fees as a part of the damage. These matters also are for the Court as provided for in the statute.

You cannot make any findings on damages in this case which is based on speculation and conjecture rather than on competent evidence and the inferences to be reasonably drawn therefrom.

The fact that the Court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of the Court that the Court believes or does not believe that Phillips Brothers Coal Company is entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount of damages under the rules of law, should you find that there is liability in the case. If you 3485 find there is no liability in the case, either to the Trustees because you find there was a conspiracy in which the Trustees allegedly participated, or to Phillips Brothers Coal Company because you find there was no conspiracy, you will disregard the instructions pertaining to damages.

Now, members of the jury, we revert again, with particularity, to that phase of the case involving the Trustees. As you will recall, the Court stated in the beginning Mr. Lewis, Mr. Schmidt, and Miss Roche, as Trustees of the

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United Mine Workers of America Welfare and Retirement Fund, instituted a suit, or this suit in this Court, against Phillips Brothers Coal Company, to recover \$55,982.62, which represents royalties alleged to be due under the terms of a trust provision contained in a collective bargaining agreement which existed from October the 1st, 1953, to December 31, 1955, between the United Mine Workers of America and the coal operators, to which Phillips Brothers Coal Company was a party.

As previously indicated, the only defense raised by Phillips Brothers Coal Company to this action is that the collective bargaining agreement was an instrument used in an alleged conspiracy allegedly participated in by the Trustees, the Union, and certain coal companies, allegedly violative of the anti-trust laws. If the defense raised by

Phillips Brothers to this claim of the Trustees is not a good defense, the parties have stipulated that the amount sued for is the correct amount which the Trustees are entitled to recover.

But if the defense of Phillips Brothers Coal Company is a good defense, you will say so by your answer to the question contained in the verdict form number one, and the Court will then decide whether or not the Trustees are entitled to recover this \$55,982.62, the item which is the basis of their suit.

The Court instructs you that the United Mine Workers of America Welfare and Retirement Fund of 1950 was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and that the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust agreement provides for the payment of benefits to employees of signatory operators, of which Phillips Brothers was one.

The Trustees of this Fund, in their official capacity, had no legal right to require or not to require the bene-

ficiaries of the Fund to picket on behalf of UMW in labor matters.

The Trustees were legally obligated to collect all moneys due the Fund and to use all reasonable means to make such collection, including the bringing of lawsuits.

3487 Phillips Brothers Coal Company contends that the Trustees participated in the alleged conspiracy to violate Sections 1 and 2 of the Sherman Act and committed overt acts in furtherance of the alleged conspiracy, among which were:

- (1) They paid benefits only to members of the UMW;
- (2) That as a punitive measure, they brought legal actions against coal operators to recover royalties on coal produced; and
- (3) That they required beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits.

These alleged acts, standing alone, would not show that the Trustees were co-conspirators.

The act or acts of individuals, unless you find from the evidence that the Trustees actually participated in, or actually authorized such unlawful act, if any, or ratified such act, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to an alleged conspiracy.

Phillips Brothers Coal Company's allegations must be judged separately as to the Union and as to the Trustees, and the position of the Union and the Trustees must be judged each on its own merits. The Union and the Trustees, therefore, are entitled to individual consideration

3488 of the particular evidence applicable to them to determine whether either the Union or the Trustees participated in the alleged conspiracy.

If any expression of the Court has seemed to indicate any opinion relating to any of these matters, the Court instructs the jury to disregard it.

Court's Charge to the Jury

If the Court has made a mistake in its interpretation of the law in this case, then that is a matter that must be dealt with by our Court of Appeals. To repeat again, it is the duty of the jurors to accept the law as stated to them by the Court and to apply the law to the facts in the case.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to this lawsuit.

It is your duty to follow the law as given in these instructions and to apply it to the evidence in reaching your verdict. These instructions should be considered as a whole. You are not to single out any certain sentence or any individual point in applying them to the evidence in this case.

You are not bound to accept or to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number of witnesses or other evidence 3489 which appeals to your mind with more convincing force. In other words, you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence which may be offered in support of or against any particular proposition.

In this regard, you are instructed that the testimony of one witness whom you find is entitled to full faith and credit on his oath as a witness is sufficient for the proof of any fact and can justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if upon the whole case, and considering the credibility of the witnesses, as will be explained to you or has been explained to you, you should decide that the weight of the entire evidence pointed to the accuracy and honesty of that one witness.

As indicated to you by the Court on various occasions during this trial, the statements and arguments of counsel

Court's Charge to the Jury

are not evidence in this case, nor are the contentions of the parties unless supported, of course, by evidence. It is your recollection alone of what the various witnesses testified to and what the various documents and exhibits admitted into evidence contain that must guide and govern you in reaching your verdict. During the course of the trial, you
3490 have heard the attorneys representing the various parties making objections and on occasion giving the reasons for their objections. The Court made rulings on these objections. You should not be concerned with such rulings or the reasons for them. Whether offered evidence is admissible for your consideration or not is purely a question for determination by the Court and no inference should be drawn from these various rulings of the Court.

You are not to consider the number or type of
3491 objections as evidence against any party. Further, when admitting evidence to which an objection has been made, the Court, as you have so often been told, is not ruling on the weight to be given to that evidence. The question of weight is solely for the jury to determine. When the Court has sustained an objection to a question, that withdraws such question from your consideration. You should not, under any circumstances, speculate as to what the answer might have been.

You are not warranted in finding that the Trustees of the Union participated in the alleged conspiracy by performing an act in furtherance of and with knowledge of the conspiracy unless you find by the fair preponderance of evidence that such party had such knowledge and took such action prior to December 31, 1958.

Ladies and gentlemen of the jury, you are the exclusive judges of the facts in this case, the testimony of the witnesses and the weight to be given their testimony. In weighing the evidence you will look to the manner and demeanor of the witness while he was upon the witness stand, to his intelligence or lack of intelligence, to any bias or feel-

Court's Charge to the Jury

ing that may have been manifested, and to his relationship or lack of relationship to any of the parties in this case, his means of knowledge of the facts upon which he testifies, the reasonableness or unreasonableness of the story 3492 that he tells. All of these things you will take into consideration in weighing the testimony, and you will give greater weight to that witness or those witnesses, who in your opinion, more accurately detailed the facts of the case.

There are methods of impeaching a witness. One is to involve the witness in discrepant and untruthful statements while he is on the witness stand by close examination, either direct or cross. Discrepant statements relating to immaterial matters involved in the lawsuit do not necessarily affect the credibility of the witness unless the jury finds there is something to show that they originated in wilful falsehood.

Another method is to show that the witness, out of court, made statements as to material matters to which his testimony relates which are contrary and contradictory to the evidence given by him in court.

As to whether any of these invalidating processes have occurred in this case with respect to any of the witnesses who have testified, is for you, the jury, to determine. If a witness is impeached during his testimony, then he remains an impeached witness throughout the case and the jury may disbelieve his testimony, if it thinks that it should do so.

Now members of the jury, there have been one or more witnesses introduced in the trial of this case who 3493 testified as expert witnesses. If they were introduced as expert witnesses and the Court permitted them to testify as experts, that means that the Court believed that they were entitled to testify as expert witnesses under the law.

Now if these so-called expert witnesses testified as to

Court's Charge to the Jury; Forms of Verdict

facts relating to the case, then you will weigh their testimony just exactly as you weigh the testimony of a lay witness and under the rules heretofore explained to you. But if they did not testify as to facts relating to the case but simply gave opinions, their opinions as experts about the case, then you will consider such testimony as opinion evidence and weigh it accordingly. You will scrutinize, you will weigh carefully, opinion evidence.

An expert witness is a witness ordinarily possessing knowledge which is not possessed by the ordinary lay witness. So when questions arise in a lawsuit that involve technical knowledge with which the lay witness and the lay jury is not possessed, the expert witness is permitted to give his opinion on technical matters to assist the jury in arriving at the truth in the case. The jury may attach to the opinion of the expert much or little weight.

The jury is reminded by the Court to remember that expert evidence ordinarily is opinion evidence and it should be examined with scrutiny and care by the jury.

3494 . Now, in closing, members of the jury, you will have access in your jury room, by agreement of all parties in this case, and you may refresh your recollection from, to the various exhibits which have been introduced in this case. And, as an aid to you in reaching your verdict, the Court has caused to be prepared verdict forms which you may take with you to the jury room and which you may use in arriving at your verdict.

Those forms were explained to you before the arguments were made in this case, but the Court at this time, so that there may be no misunderstanding about that, will briefly run over these forms again.

Form No. 1 contains one paragraph and is in this language:

"Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company?"

Court's Charge to the Jury; Forms of Verdict

There are places for an answer to that question. That question may be answered Yes or No by the jury, and whichever answer is made will be filled in by the jury through its foreman in one of the blank lines shown on this form. When it is filled in by the foreman then the foreman will sign the verdict and will return with it in open court and announce it in open court.

3495 Form No. 2 contains three paragraphs. The first paragraph reads as follows:

"Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiffs, Phillips Brothers Coal Company?"

Again there are blank lines for the jury to answer this question Yes or No, and the jury will, through its foreman, fill in the answer to this question.

If your answer to Question 1—that is the question I have just read—is No, the remaining questions need not be answered.

Paragraph 2:

"If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

Again you will answer that question by causing your foreman to fill in the answer Yes or No in one of the blank lines shown on the form.

If your answer to Question 2 is No, you need not answer

Question No. 3 reads, as follows:

3496 "We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of ---- dollars."

Objections to Court's Charge

If you find for Phillips Brothers Coal Company you must go further and make the award, and you must fill in this blank space the amount of the award and then have your foreman sign the verdict form and return with it in open court and announce it through your foreman.

The jury at this time may be excused temporarily.

(The jury was excused from the courtroom and following proceedings were had in the absence of the jury.)

The Court: Now, Mr. Kramer, for the original plaintiffs and the cross-defendant, do you have any objection to any part of this charge or any further special requests?

Mr. Kramer: As your Honor realizes, the charge has taken a substantial period of time, as of course, it must have taken, and could we have a few minutes for a conference among counsel before we announce?

The Court: Well, now, Mr. Kramer—

Mr. Kramer: Just ten minutes, your Honor.

3497 The Court: I will let you consult right now. I can't recess the court. I will wait.

Mr. Kramer: Wait for a little consultation.

The Court: I don't want to hurry you. You can discuss it there among yourselves but I do not want to recess court because I have talked to you gentlemen in chambers about this charge, and I have tried to tell you exactly what I was going to charge and I acted on all the special requests before coming in here this morning and telling you gentlemen that except those that were charged—and you will note, you are bound to have noted from this charge, that many of yours, Mr. Kramer, were charged almost verbatim.

* * * * *

3499 Mr. Kramer: Your Honor has had before you the requests which we made for instructions, and Your Honor has passed on these requests and written your notations on the side.

Your Honor, to the failure of the Court to give a few of these requests in the language which we submitted them, there are only a few, we want to reserve exceptions.

Objections to Court's Charge

The Court: All right, sir.

Mr. Kramer: I am referring now, Your Honor, to the revised requests, and does Your Honor want me to read the request rather than just refer to the number?

The Court: If you will just refer to the number and let the reporter take it down and copy it in, and tell me just what it pertains to, that is the subject.

Mr. Kramer: I refer first, Your Honor, as an objection to Your Honor's charge, failure to give what is our request 37 in the revised request, and it appears on page 11 and carries over on page 12 of our memorandum, Your Honor, and it deals with — starts out —

3500. (Thereupon, counsel read a portion of the requested charge which is copied in its entirety as follows:)

"In the course of collective bargaining the Union had the right to seek high wages and benefits. It had the right to bargain for such wages even though it may have realized that a high wage scale would result in greater mechanization and less employment in the mines, and this does not indicate of itself a conspiracy on the part of the Union to violate the Sherman Act. Even if the Union and the coal companies with whom it bargained collectively realized that the wage rates and benefits provided in the agreement could not economically be met by a company unable to mechanize its production, this, of itself, would constitute no violation of the anti-trust laws. (Apex Hosiery Co. v. Leader, 310 U. S. 469 [1940])."

The Court: I gave every consideration to that, and I think you will find I gave the substance of it in the charge.

Mr. Kramer: Your Honor did charge on that subject.

The Court: That's right.

Mr. Kramer: We didn't think sufficiently.

3504 Mr. Kramer: Thank you.

Our second objection, Your Honor, was failure of the Court to give what was our request forty-nine, in our revised requests, which appears on page fourteen of these

Objections to Court's Charge

requests, and it is with reference to the so-called "union security provision."

(The request referred to is as follows:)

"I charge you that the so-called union security provision of the National Bituminous Coal Wage Agreement was not in violation of either the Taft-Hartley Act or the law of the State of Tennessee and that such provision did not constitute an effective union shop clause whereby the union dominated or controlled the employees working in the coal industry. (Fentress Coal and Coke Company v. Lewis, 264 F. 2d 134 [6th Cir.]; Quality Coal Company v. Lewis, 270 F. 2d 214 [7th Cir.])"

3505 Mr. Kramer: I will read it in full if Your Honor cares to, but Your Honor has it.

The Court: Didn't I charge on that?

Mr. Kramer: You did charge on union security, but we didn't think you quite covered it.

The Court: You need not re-read it, because the Court has read it.

Mr. Kramer: Now the third one is objection number three, which was the failure of Your Honor to give our request number fifty as expressed on page fifteen of our revised list. This deals with the picketing of members of the United Mine Workers of America — yes, picketing by people who are beneficiaries of the Welfare and Retirement Fund.

(The request referred to is as follows:)

"The fact, if it be a fact, that members of the Union who were receiving benefits from the United Mine Workers of America Welfare and Retirement Fund engaged in picketing at one or more coal mines while a labor dispute was in progress is not entitled to any consideration by the jury on the question of whether or not the Union violated the Sherman Act."

The Court: The Court is satisfied with its charge on that subject, and I am sure counsel remembers. It was very

Objections to Court's Charge

short, but I told them in substance the Trustees
 3506 didn't have any authority over the pensioners or the
 beneficiaries in that respect. That is what I told
 them.

Mr. Kramer: The way we understood your charge was
 that Your Honor did charge it in dealing with the effect on
 the Welfare and Retirement Fund, but we did not think it
 covered over to the defense as made by the Union, and it
 was on that basis that we are reserving this objection.

The Court: Well, now, you may have a point there.

Mr. Kramer: This request was — and this was in the
 Union request, Your Honor — (the request was then read
 by counsel). We thought the way Your Honor's charge
 was given it was limited to the Trustees.

The Court: Let me have that and read what it says.

Mr. Kramer: Yes, Your Honor.

The Court: Now this was picketing, was it?

Mr. Kramer: Yes, Your Honor.

The Court: All right.

Mr. Kramer: Our next objection, objection number four,
 was the failure to give our request number 63 in the re-
 vised request, which appears on page seventeen thereof.

And this I think I will read, to make my position
 3507 clear. It is short.

"I also charge you that it was no violation of the
 anti-trust laws for the Union or the coal operators to ap-
 proach the TVA to urge it to abide by the spirit and the
 letter of the Walsh-Healey Minimum Wage Act. Further-
 more, it was no violation of the anti-trust laws for the
 parties openly and in their respective self interest to urge
 the Tennessee Valley Authority to modify its methods of
 buying coal."

The Court: What number is that?

Mr. Kramer: That is number fifty-three, Your Honor.

Mr. Kramer: The other one, Your Honor, is the last
 paragraph in what was our request 53(a), and it appears—

Objections to Court's Charge

failure to give this portion in Your Honor's charge — and it appears at the top of page 18 in these revised requests, and reads as follows:

"I charge you as a matter of law that the fact that the Union may have had a financial stake in West Kentucky Coal Company's business does not by itself indicate that they participated in that company's so-called predatory practices, if there were any, in violation of the anti-trust laws. The Union must have participated, either through being members of an overall conspiracy, one of whose ends was that West Kentucky Coal Company perform the predatory practices, or it must have specifically participated in the practices amounting to the violation, other than through its ownership or other financial interest in West Kentucky Coal Company."

The Court: Now, I remember — Mr. Rowntree, do you think I covered that?

Mr. Rowntree: Yes, sir, I think you covered that up one side and down the other.

The Court: You see, Mr. Kramer, I am going to give these in substance that you present, but you just almost wore me out with these requests.

3509 Mr. Kramer: All right. We reserve objection, your Honor.

And now the next one is the failure of your Honor to give our Request 58 in modified form, which is found on page 20 of this list, which I will read. It is brief, your Honor.

"Since November 1955, firms selling coal to the TVA by contracts calling for \$10,000 or more in coal, whether on a term contract or spot contract basis, have been required by the Walsh-Healey Act to pay the prevailing wage paid to bituminous coal miners in the area as such prevailing wage was found by the Secretary of Labor. From November, 1955, through October 20, 1958, this minimum wage was \$2.245 per hour; and from October 20, 1958, to date" —

Objections to Court's Charge

and that ought to be December 31, 1958 — "to December 31, 1958 was \$2.745 per hour. If you find that Phillips Brothers Coal Company did not elect to pay the prevailing wage paid to bituminous coal miners, as found by the Secretary of Labor, and if you further find that therefore Phillips Brothers Coal Company did not elect to sell coal to Federal agencies in quantities of \$10,000 or more, I charge you that Phillips Brothers Coal Company is not entitled to recover for any losses it sustained thereby."

3510 The Court: Well, I am satisfied with the charge.

Mr. Kramer: But I have one or two other general ones not covered by the requests.

The other one is this, Your Honor. That there is involved in this case a written contract which is a collective bargaining agreement. In discussing this the other day, we understood the substance, although I do not think we had a written request in, to the effect that your Honor would charge the jury, in substance, as follows, which we do not think was covered:

That where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law. And I don't believe your Honor gave that charge.

It reads, "Where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law."

The Court: All right.

3511 Mr. Kramer: I have only one more, your Honor, and this deals with the question of the pricing policies of the companies that are alleged to be the co-conspirators.

With reference to those pricing policies in discussing the question of damages in your Honor's charge, we feel that undue emphasis, inadvertently, crept into Your Honor's charge with reference to the theories of the cross-plaintiffs, and that our theories with reference to these pricing pol-

Court's Further Charge to the Jury

icies as set forth in the theories submitted to your Honor on page 12 of our suggested theories — 12 and 13 — did not receive like emphasis.

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The Court: All right. Now remind me of this. I expect to give this when the jury comes back, your theory. Off the record —

(Remarks of the court off the record.)

The Court: I expect to give the substance of 53 and the substance of 50. If I fail to give these when the jury 3512 returns, you call it to my attention.

Mr. Kramer: The only other thing we want to say, and we have already said it, probably not necessary now, we do reserve objection to the failure of your Honor, in the questions submitted to the jury — I mean for the final determination, to fail to include one to name the alleged co-conspirators.

The Court: Mr. Kramer, let me tell you, you have made your points so gentlemanly that the Court feels almost ashamed that it can't do everything you ask it to do.

Mr. Kramer: Thank you.

The Court: All right.

Mr. Rowntree: If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges.

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(The jury returned into open court and the following proceedings were had in the presence of the jury.)

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3513 The Court: Members of the jury, I want to supplement what I have said to you in the main charge in the following respects.

You will recall that I stated to you in some detail the theory of the Phillips Brothers Coal Company with respect to the damages it claims to have sustained by reason of the alleged wrongdoing of the alleged conspirators.

Court's Further Charge to the Jury

At this time I want to state to you the theory of the United Mine Workers on that subject.

U.M.W. says that it had nothing to do with the pricing policies of any company, or group of companies, to any market including the TVA. It says further that there is no evidence to show that any company or group of companies entered into an agreement between themselves to undertake to depress the TVA coal market or that they or any of them had any intention of doing so.

In this connection U.M.W. says the evidence shows that East Tennessee mines sell to TVA eastern division steam plants but cannot, because of the cost of transportation, compete for the sale of coal for western division steam plants. Similarly, Western Kentucky mines are unable to compete with East Tennessee mines for coal business at TVA's eastern division steam plants — again because of the cost of transportation; and that the evidence shows that during none of the years in question did TVA reduce its consumption of coal in its eastern division plants by reason of purchases of coal at its western division plants.

3515 UMW says that the fluctuations in the price of the TVA market were controlled by the law of supply and demand as witnessed by the fact that in 1956 when TVA's purchases were at its highest level the price of coal was at a higher level than it was in subsequent years. In this connection UMW says that the decline in the national consumption of coal in 1958 heightened competition for all available markets and thus naturally caused a decline in price.

The Court further charges you that the fact, if it be a fact, that members of the Union who were receiving benefits from the United Mine Workers of America Welfare and Retirement Fund engaged in picketing at one or more coal mines while a labor dispute was in progress is not entitled to any consideration by the jury on the question of whether or not the Union violated the Sherman Act, unless

Court's Further Charge to the Jury

the jury finds from the evidence that such picketing was a part of an alleged conspiracy entered into by the UMW and one or more of the alleged coal operators named in the complaint, and that it was a part of the conspiracy and so picketing to drive the small operators out of business in order that the larger operators might have the business.

The Court further charges you that it was no violation of the anti-trust laws for the Union or the coal operators to approach the TVA to urge it to abide by the spirit 3516 and the letter of the Walsh-Healey Minimum Wage

Act. Furthermore, it was no violation of the anti-trust laws for the parties openly and in their respective self interest to urge the Tennessee Valley Authority to modify its methods of buying coal, unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business. In other words, the approach by these parties to the TVA to get it to change its policies with respect to coal buying standing alone was in no respect a violation of law and should not be considered by the jury as a violation of law standing alone as the parties had the legal rights to approach the TVA in an effort to get the TVA to change its policies with respect to coal buying.

The Court further charges you that where two reasonable constructions of a written contract can be made, preference is given to that construction of such contract that does not result in a violation of law.

Now that simply means that where a contract on its face is ambiguous, and if it is ambiguous and the parties can't agree on the meaning of it, then they are entitled to go into a court and have it construed. And if the Court can, in construing that contract, reach a result so as to make the contract comply with the law, then the Court will reach that result. In other words, the Court will not construe 3517 a contract to violate the law, if it can by reasonable construction construe it to come within the purview of the law.

Verdict of the Jury

3527 (After a short wait counsel appeared and the following proceedings were had.)

The Court: Mr. Foreman, have you reached your verdicts?

The Foreman: We have, your Honor.

The Court: All right. Would you please stand and read your verdicts.

The Foreman: You wish me to read the verdict forms?

The Court: Yes, sir, and read the answers to those forms so we can all hear you.

The Foreman: Verdict Form No. 1.

Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states as alleged by the original defendants, Phillips Brothers Coal Company?"

3528 Answer: Yes.

The Court: Is that the verdict of all the jurors; if so, hold up your hands!

(The jurors indicated in the affirmative.)

The Court: All right.

The Foreman: Verdict Form No. 2:

"Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff Phillips Brothers Coal Company?"

Answer: Yes.

The Court: Is that the verdict of the jury? Hold up your hands if it is.

(The jurors indicated in the affirmative.)

The Court: All right. Go ahead.

The Foreman: "If your answer to Question 1 is 'yes', was cross-plaintiff, Phillips Brothers Coal Company, dam-

Verdict of the Jury

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aged in its business or property as a direct and proximate result of the conspiracy?"

The answer is: Yes.

The Court: Is that the verdict of all of you? Hold
3529 up your hands.

(The jurors indicated in the affirmative.)

The Court: All right.

The Foreman: "We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of \$90,000.00."

The Court: Is that the verdict of the jury, so say you all?

(The jurors indicated in the affirmative.)